APPENDIX A

Opinion by Judge LaBuy reported in United States v. De Lucia, 163 F. Supp. 36

The complaint in the above cause filed October 10, 1956 prays for the cancellation of a certificate of naturalization granted September 27, 1928 to Paul DeLucia for the reason that it was procured by concealment of material facts and by wilful misrepresentation.

During the course of the trial the court reserved its ruling on defendant's objections to the admissibility of several exhibits. The court overrules these objections and these exhibits are received in evidence.

The only evidence in the case is that presented by the plaintiff. The government introduced twenty-two witnesses and approximately seventy documents and charts. The defendant, although present in the courtroom throughout the trial, offered no evidence on his own behalf. He previously invoked the protection of the Fifth Amendment and has refused to obey the court's order requiring him to respond to questions asked at his deposition. The sole information which this defendant has given is that he is Paul DeLucia and resides at 1515 Bonnie Brae, River Forest, Illinois.

Two deputy minute clerks identified this defendant as having appeared before them and saw him sign the name Paul DeLucia on appearance bonds involving other matters. (Exs. 25, 26.) A United States deputy marshal also identified the defendant as having been fingerprinted in the Marshal's office in this city and that the defendant affixed his signature as Paul DeLucia. (Exs. 24A, 24B, 24C.)

The first basic issue which the government must prove is that this defendant, Paul DeLucia, is the same Paul DeLucia who was granted a Certificate of Naturalization in September 1928.

To this end the government's evidence consists of the testimony of Michael J. Fish, who identified this defendant as the same person for whom he appeared and signed as a witness during the naturalization hearings preceding the granting of the certificate. Mr. Fish testified that at that time he was employed as a staff photographer for the Chicago Tribune; that at that time Paul DeLucia was a restaurant manager; and that he did not know the defendant used the name Paul Maglio. He further testified that the other witness to the proceedings was Frank Meo, whom he believed to be now deceased.

Supplementing this testimony, the government presented documents relating to the naturalization proceedings. They consist of a Petition for Naturalization dated April 10, 1928 (Ex. 1); Preliminary Form for Petition for Naturalization, dated February 21, 1928 (Ex. 2); Declaration of Intention, dated January 9, 1925 (Ex. 4); Certificate of Naturalization dated September 27, 1928 (Ex. 5); and ship's manifest for the vessel SS Ryndam (Ex. 7). A perusal of these documents gives the following information: Paul Maglio arrived at the Port of New York from Boulogne, France on August 10, 1920 on the vessel Ryndam and was coming to a person named Gennaro Calabrese; that his occupation was restaurant manager; that he was born in Apricena, Italy on July 10, 1898 and his mother's maiden name was Nunzia Maria Torelli; that he used another name which was "Paul DeLucia" because he "got married on that name" and desired that his name be changed to Paul DeLucia; that he was married January 3, 1927 and his wife's name was Nancy, born October

2, 1905 in Naples, Italy and that he had a daughter, Mariana, born in Chicago; that he resided at 905 South Halsted Street, Chicago; that he had never been arrested and that he expected to use as witnesses Frank Meo, proprietor of a cigar store at 905 South Halsted Street, and Michael J. Fish, staff photographer for the Chicago Tribune residing at 4920 Monroe Street. The certificate of naturalization was granted to Paul DeLucia whose name was changed from Paul Maglio. Said certificate is signed "Paul DeLucia"; all the other documents being signed "Paul Maglio."

A handwriting expert testified and made a comparison of the signature of Paul DeLucia appearing on the Certificate of Naturalization with the known signatures of this defendant affixed before the two deputy minute clerks and the United States deputy marshal. (Ex. 51.) It was his conclusion that the signature was made by the same person. It was further his conclusion that the signatures of Paul Maglio appearing on the Petition for Naturalization, Declaration of Intention, Preliminary Form for Petition for Naturalization, and Naturalization Form #2328 (Ex. 3), and the signature of Paul DeLucia appearing on the certificate were made by the same person.

In addition, the government has submitted documentary evidence to show that this defendant has a wife named Nancy Emily Gigante, born October 2, 1906 or 1905 in Naples, Italy, who resides at the same address as this defendant, 1515 Bonnie Brae, River Forest, Illinois, and whose old addresses were the same as this defendant's. (Exs. 17A, 17C, 17D, 17E, 19A, 19C, 19G, and 19I through L, 20B through D, 21A and 21B.) Nancy Emily DeLucia had three children named Mary, Anthony, and Paul Jr., and this defendant had three children named Mary Anna, Anthony Paul, and Paul Richard. (Exs. 17E, 21F.)

It is the court's conclusion that this evidence clearly established that this defendant is the Paul DeLucia to whom a Certificate of Naturalization was granted September 27, 1928; and that this defendant, Paul DeLucia, used the name Paul Maglio when he entered this country and when he applied for a certificate of naturalization.

The next basic issue which the government must prove is that this defendant falsely assumed the name of Paul Maglio when he applied for his naturalization.

In this connection, a witness, Paul Maglio, not the defendant in this case, testified that his mother's maiden name was Nunzia Maria Torelli and his father's name was Enrico; that he was born in Apricena, Italy on July 10, 1898; that he had five sisters all born in Apricena, four of whom were living named Adele, born 1890; Rosa, born 1893, Angiola, born 1895, and Elvira, born 1900; that his father died in 1924 at the age of 70 and his mother in 1940 at the age of 75. This witness stated he left Italy on July 23, 1920 and arrived in the United States on August 3, 1920. He stated that the population of Apricena at that time was approximately 6000; that he had always lived in this town except for a short period of military service and until he left for the United States; that his occupation while in Apricena was a Clerk and Registrar in the City Hall and that his duties were to keep a record of all births and deaths; that there was no other "Maglio" family residing in Apricena, Italy than his own when he lived there; that there was no other Enrico Maglio in Apricena other than his father, nor was there any other Nunzia Maria Torelli other than his mother. He identified the records pertaining to his family which the government presented, as well as his own passport and citizenship papers. Government's Exhibit 14P is an attestation that no record of the birth of Paolo Maglio exists in Apri-

cena other than that of Paolo Maglio born July 10, 1898, son of Enrico and Nunzia Maria Torelli. This witness, Paul Maglio, was requested to view the defendant, Paul DeLucia, and testified that this defendant was not his uncle, father, cousin or related to him in any way and that he had never seen him before in his life.

Alfonso Torelli, a cousin of the witness, Paul Maglio and a nephew of the witness's mother, corroborated the testimony of Paul Maglio and upon viewing the defendant stated he had never seen this man before in his life.

The court is of the opinion that the government has conclusively shown that the defendant, Paul DeLucia, was not Paul Maglio, born July 10, 1898 in Apricena, Italy; that he falsely assumed the name of Paul Maglio to enter this country; that he committed perjury when he stated his name was Paul Maglio in the preliminary papers for citizenship and thereby committed a fraud on the court.

The next issue which presents itself is whether Paul DeLucia is in truth and fact Felice DeLucia.

The government's evidence on this phase of the case consists of the testimony of Special Agent Philip Dunne and a number of documents, which may be grouped into two divisions: (1) information which had been voluntarily supplied by this defendant which is inconsistent with his identity as Paul Maglio and consistent with an identity as Felice DeLucia; and (2) the family history of Felice DeLucia.

In the first division of exhibits, a marriage register dated January 30, 1927, kept in the Holy Guardian Angel Church in Chicago, shows that Paolo di Lucia, age 29 years from Naples, son of Anthony and Mary Annunziata was married to Annunziata Gigante, 21 years old, daughter of Ciro and Anna Porzio. (Exs. 18, 18A.) Nancy Emily

DeLucia, wife of Paul DeLucia, had parents whose names were Anna and Ciro Gigante; her maiden name was Annunziata Gigante, and she was born October 2, 1905 in Naples, Italy. (Exs. 17E, 17G, 20D.)

On September 8, 1927 Paul DeLucia executed a signature card for the First National Bank of Chicago indicating his address was 917 Blue Island Avenue, that he was born in Naples, Italy on November 14, 1897 and that his mother's maiden name was Maria Annunziata. (Ex. 20A.) Exhibits 20B and 20C show that in 1931 Nancy DeLucia resided at 917 Blue Island Avenue. The signature of Paul DeLucia was examined by the handwriting expert against the known signatures of this defendant made on the United States Marshal's fingerprint cards. It was his conclusion that these signatures were made by the same person.

Two applications for beneficial membership in the Italo-American Union dated November 25, 1932 (Ex. 22A) and January 15, 1934 (Ex. 22B) were introduced. The applicant signed his name as Paul DeLucia, indicated he was born in Naples, Italy on the "?" day of July, 1898; that he was married and his beneficiary was to be his wife Nancy E. DeLucia; that his father and mother were deceased at the ages of 65 and 40 respectively; that he had no brothers and had four sisters, ages 26 to 32 (Ex. 22A) and 27 to 33 (Ex. 22B). On November 22, 1935 Paul DeLucia, age 37, 5300 West Jackson Boulevard, owner of the Playhouse Theatre applied for insurance in the Northwestern National Life Insurance Company (Ex. 21C). On that application he stated he was born in Naples, Italy on November 14, 1898, which was later corrected to November 14, 1897. It shows he had a daughter named Mary Anna and a son, Anthony P. DeLucia. In connection with that application Paul DeLucia gave certain answers to the

medical examiner on the same day indicating date of birth to be November 14, 1898, that his father died in 1924 and his mother in 1918. (Ex. 22E.) On December 17, 1938 Paul DeLucia applied to the Equitable Life Assurance Society for a retirement annuity wherein he stated he was born in Italy on November 14, 1897, was married, lived at 5300 West Jackson Boulevard, and his occupation was World Playhouse. (Ex. 23A.) In a letter to the Equitable on January 20, 1939 he advised that he was born in Italy on November 14, 1897. (Ex. 23D.) On November 25, 1941 Paul DeLucia made certain answers to the medical examiner in connection with application for insurance in Northwestern Mutual Life Insurance Company indicating his date of birth to be November 14, 1897, that his father and mother were deceased at the ages of 53 and 39 respectively, that he had no brothers, and had four sisters, ages 36 to 42. (Ex. 21D.)

The handwriting expert made comparisons of these signatures with the known signatures of Paul DeLucia, and, with one exception, testified that the signatures had been written by the same person.

Special Agent Philip Dunne testified to a conversation had with this defendant on October 1, 1947 in the office of the Federal Bureau of Investigation. He testified that the defendant stated his name to be Paul Maglio, born in Apricena, Italy on July 10, 1898; that his parents were deceased, but he had four sisters residing in Italy whose names were Emily, Anna, Clementina, and Louisa ages 41 to 47; that he married Nancy Annunziata Gigante on January 30, 1927, and had three children Mariana, Anthony Paul and Paul Richard; that in the early thirties he lived at or about 5300 West Jackson Boulevard, and in the early forties bought a farm near Joliet, Illinois.

From this evidence it appears that the defendant voluntarily has given the following information which is inconsistent with his identity as Paul Maglio; that he was born in Naples, Italy on November 14, 1897, that his parents were Anthony and Mary or Maria Annunziata, that he had four sisters whose names were Emily, Anna, Clementina, and Louisa whose ages in 1947 were from 41 to 47 years.

The government has presented in the next division of exhibits documentary evidence that one Felice DeLucia was born in Naples, Italy, on November 14, 1897, whose parents were Antonio and Maria Annunziata (Ex. 28), whose children were a son; Felice, born in Naples, and four daughters born in Ottaviano, Italy, named Emilia Beatrice, born 1898, Anna Clementina, born 1901, Clementina Eleonora, born 1905, and Luise Maria, born in 1907. (Exs. 29, 33A, through D.) Exhibit 42 shows that there was only one Felice DeLucia whose birth was registered on November 14, 1897 in Naples, Italy, and whose parents were Antonio and Maria Annunziata. Exhibits 14M and 14N show there was no birth certificate for a Paolo Maglio, son of Enrico and Maria Torelli, either in Naples or Ottaviano, Italy, or for a Felice DeLucia in Apricena or Ottaviano, Italy. (Exs. 40, 43.) Felice DeLucia's father died at the age of 55 in January 1925 (Ex. 31A) and his mother at the age of 44 in May 1917 (Ex. 31B).

Government exhibits 36, 37 and 38 are official documents showing that Felice DeLucia, son of Antonio and Maria Annunziata, born November 14, 1897 in Naples was convicted in 1917 of the voluntary homicide of Emilio Perillo, and in 1920 of Vincenzo Capasso. Exhibit 39 is a record showing that Antonio DeLucia, was charged with others for the homicide of Raffaele Perillo on July 1920 and with giving assistance to the "premeditated homicide on the person of Vincenzo Capasso, by causing culprit Felice

DeLucia, his absconding son, to make up his mind to commit it."

The court is of the opinion that the foregoing evidence clearly establishes that Paul DeLucia and Felice DeLucia are one and the same person.

The use of an assumed name to gain entry into the United States, or such use in the filing of a Declaration of Intention has been held sufficient grounds for revocation of a naturalization certificate, unless it is shown that this name had been one assumed and used prior to entry into the United States. *United States* v. *Goldstein* (D.C.N.Y., 1939), 30 F. Supp. 771; *United States* v. *Shapiro* (D.C. Calif., 1943), 43 F. Supp. 928; *United States* v. *Perez* (D.C. N.Y., 1939), 29 F. Supp. 888; *United States* v. *Marino* (D.C.N.Y., 1939), 27 F. Supp. 155; *Fink* v. *Reimer* (C.A. 2, 1938), 96 F. (2d) 217; *Landon* v. *Clerk* (C.A. 1, 1957), 239 F. (2d) 632. Cf. *United States ex rel. Liebowitz* v. *Schlotfeldt* (C.A. 7, 1939), 94 F. (2d) 263. The fact that an applicant fails to reveal his criminal record is also grounds for cancellation of a naturalization certificate. *Corrado* v. *United States* (C.A. 6, 1955), 227 F. (2d) 780; *United States* v. *Montalbano* (C.A. 3, 1957), 236 F. (2d) 757; *United States* v. *Ascher* (C.A. 2, 1945), 147 F. (2d) 544; *United States* v. *Accardo* (C.A. 3, 1951), 208 F. (2d) 630; *Stevens* v. *United States* (C.A. 7, 1951), 190 F. (2d) 880.

In *Corrado* v. *United States*, *supra*, the court stated:

> "• • • How could any Government official or witness say whether or not citizenship would have been denied appellant from an investigation of the various causes of his arrest, when no opportunity for investigation was afforded? His false statement upon the material matter in actuality caused no investigation to be made. To be awarded citizenship in the United States exacts

> the highest standard of rectitude. Our Government should be afforded full opportunity for investigation of the moral character and fitness of an alien who seeks to be vested with all the rights, privileges and immunities of a natural born citizen of the United States. * * * "

In *United States* v. *Mantalbano*, *supra*, the court said:

> "* * * The theory seems to be that one may deliberately engage in a falsehood concerning required facts during naturalization proceedings, without fear of consequences so long as the truth, had it been revealed would not have resulted in refusal of citizenship. The proposition has a built-in rebuttal. Mere recital of it bares its absurdity. If the government thinks it important enough to ask a question which it has authority to ask, the answer cannot be considered immaterial and meaningless. That the answer may not lead to a refusal of citizenship is not the only consideration. The government is entitled to know all the facts which it requires. * * * "

See also *United States ex rel. Volpe* v. *Smith* (C.A. 7, 1933), 62 F. (2d) 808, 812.

In an application for citizenship it is indispensable that true identity be disclosed. The unexplained use of an assumed name by this defendant thwarted investigation as to his eligibility for United States citizenship.

The defendant was present in the courtroom throughout the trial and had opportunity to present evidence on his own behalf. His failure to testify or present any evidence may justly give rise to the inference that he was not in a position to combat or explain away the government's evidence. *Mammoth Oil Co.* v. *United States* (1927), 275 U.S. 13, 52; *Local 167 of I. B. of Teamsters* v. *United States* (1934), 291 U.S. 293; *Bilokumsky* v. *Tod* (1923), 263 U.S. 149; *Vajtauer* v. *Commissioner* (1927), 273 U.S.

193; *Runkle* v. *Burnham* (1894), 153 U.S. 216; *Kirby* v. *Tallmadge* (1896), 160 U.S. 379; *Northern Ry. Co.* v. *Page* (1927), 274 U.S. 65; *United States* v. *Robertson* (C.A. 5, 1956), 233 F. (2d) 517; *Bandel* v. *United States* (C.A. 5, 1956), 234 F. (2d) 102; *United States* v. *Nowak* (D.C. Mich., 1955), 133 F. Supp. 191, 196.

Defendant urges that the unexplained failure of the government to present the testimony of the Designated Examiner conducting the hearing on Paul DeLucia's application is tantamount to a conclusion that his testimony, if he were called, would not sustain the contention of the government that Paul DeLucia had falsified his application for naturalization. In fact, the defendant contends that the entire evidence fails to show that this defendant "hid anything from the naturalization examiner." As shown by the testimony of Stephen Durisch and the deposition of Andrew Jordan, George Mackay was identified as the Designated Examiner in the proceedings involving Paul DeLucia. Mackay was not called upon to testify. The government explains this omission by submitting with its reply brief a Certificate of Death showing the decease of George Mackay.

Stephen Durisch and Andrew Jordan, both long time employees of the Immigration and Naturalization service, who served on occasion as Designated Examiners, testified to the usual and customary mode of processing and examining applicants for citizenship. Their testimony to the effect that this petition of Paul DeLucia was processed in the customary way leads the court to the conclusion that this defendant had not disclosed to the Designated Examiner all the facts material to his application for citizenship and that such failure and misrepresentation foreclosed any further inquiry on the part of the Naturalization Office.

The court holds that the use by this defendant of a name other than his own, his failure to disclose his true identity, and the concealment of other material facts vitiates the certificate of citizenship granted to him. This memorandum shall constitute the Findings of Fact and Conclusions of Law. Government counsel should present an appropriate decree within ten (10) days from date hereof.

The government's motion for a rule to show cause why this defendant should not be punished for contempt of within which to answer.
court is allowed and the defendant is given ten (10) days

Opinion of Court of Appeals in Denaturalization Case reported in De Lucia v. United States, 256 F. 2nd 487

Before SCHNACKENBERG, HASTINGS and PARKINSON, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* In a denaturalization proceeding in which §340 (a) of the Immigration and Naturalization Act of 1952[1] was invoked to sustain the jurisdiction of the district court, a decree was entered on June 11, 1957, revoking, setting aside and making void an order of said court, entered September 27, 1928, admitting Paul De Lucia, also known as Felice De Lucia, to citizenship. From that decree De Lucia has appealed.

In the denaturalization proceeding, appellee, sometimes hereinafter referred to as the government, filed its com- hereinafter referred to as the government, filed its complaint on October 10, 1956 against De Lucia, and there was attached thereto an affidavit by Charles Gordon, Regional Counsel for the Northwest Region, Immigration and Naturalization Service, United States Department of Justice, dated August 9, 1956, as required by said § 340 (a). In his affidavit Gordon deposed and said that, as said Regional Counsel, he had access to the official records of said Service, "from which the following facts appear: • • •." There follows a recital of pertinent facts as to De Lucia.

Relying on *United States* v. *Zucca*, 351 U.S. 91, De Lucia contends that an affidavit showing good cause is a prerequisite to the maintenance of a denaturalization proceeding, and, while the affidavit was submitted under the pretense that it shows good cause, affiant's assertions therein are not dependent upon his knowledge, and that, although

[1] U.S.C.A. 1451 (a)

he swears that he has access to the official records of the Service, he does not claim he is the custodian thereof or that the files were complete, but he merely states his "opinion as to what may be shown by some files."

The question of the sufficiency of this affidavit has been resolved by *Nowak* v. *United States*, ... U.S. .....[2] In

The complaint alleged that on or about April 10, 1928, pursuant to the Immigration and Naturalization Act of June 29, 1906, De Lucia, who was born in Naples, Italy, on or about November 14, 1897, filed in the court below a petition for naturalization in the name of Paul Maglio, and therein prayed that his name be changed to Paul De Lucia; that on September 27, 1928 that court admitted him to citizenship.

The complaint further alleged that in his declaration of intention dated January 9, 1925, attached to and made a part of his petition, De Lucia alleged under oath that his name was Paul Maglio and that he had been born in Apricena, Italy on July 10, 1898; that in the preliminary form of the petition for naturalization dated February 21, 1928 he stated that his full, true and correct name was Paul Maglio; that he had used the name of Paul De Lucia because he "got married on that name"; that his mother's name was Torelli Nunzia Maria; that he was born July 10, 1898, in Apricena, Italy; that he arrived in the United States at New York August 10, 1920, on the SS Ryndam; and that he further alleged under oath that he had never been arrested.

The complaint further alleged that De Lucia, in his petition for naturalization aforesaid, alleged under oath that

---

[2] No. 72, October term, 1957, decided May 26, 1958. In accordance with that decision, we hold the Gordon affidavit sufficient.

his name was Paul Maglio; that he was born on July 10, 1898 in Apricena, Italy; that he had arrived in New York at the port of New York City on August 10, 1920 on the vessel Ryndam.

The complaint charged further that the aforesaid allegations of De Lucia were false and known by him to be false in the following particulars:

(I) His name was Felice De Lucia and not Paul Maglio;

(II) He was born November 14, 1897 in Naples, Italy and not on July 10, 1898 in Apricena, Italy;

(III) His mother's name was Maria Annunziata and not Torelli Nunzia Maria;

(IV) He had been arrested and convicted of voluntary homicide under his true name of Felice De Lucia on May 18, 1917 in Naples, Italy;

(V) De Lucia's entry into the United States at New York City on August 12 (*sic*) 1920 was unlawful and there was not attached to his petition for naturalization a certificate of arrival for a lawful entry into the United States for permanent residence.

The complaint further charged that De Lucia assumed the identity of Paul Maglio in order to conceal his true identity, to hide from the immigration officers at the time of his arrival and from the naturalization examiners and the naturalization court the fact that he previously had been arrested and convicted for voluntary homicide in Naples, Italy; and that he had fled from Italy in order to escape arrest for a subsequent prosecution.

The complaint further charged that the Immigration and Naturalization Service, relying upon the foregoing false

and fraudulent representations by De Lucia, did issue a certificate of arrival in the name of Paul Maglio, which De Lucia appended to his petition for naturalization; that the concealments and misrepresentations of De Lucia heretofore set forth were deliberately, wilfully and intentionally made in the proceedings leading to his naturalization in order to deceive the naturalization examiners and the court, and further to conceal material facts from them by failing to reveal his true identity and his record of criminality prior to entering the United States; that the concealments were further made to conceal his lack of good moral character and the defendant's lack of attachment to the principles of the Constitution of the United States, to prevent the making of a full and proper investigation of his qualifications for citizenship, to induce the Immigration and Naturalization Service to rely upon the false representations and concealment of the material facts, to make the unconditional recommendation to the court that his petition for naturalization be granted, and, further, to preclude inquiry by the court concerning his qualifications and eligibility for citizenship and to procure naturalization in violation of the law; that the naturalization of the said Paul De Lucia formerly known as Felice De Lucia was procured by concealment of material facts and by wilful misrepresentation, in that he deliberately and intentionally made false statements in the proceedings leading to his naturalization as set forth above.

The complaint prayed for a decree revoking and setting aside the order of the court admitting De Lucia to citizenship, and for general relief.

Defendant filed an answer denying every allegation in the complaint.

Following a trial before the court, the trial judge filed a memorandum which was ordered to constitute findings

of fact and conclusions of law. De Lucia's motion for a new trial was overruled and the decree of denaturalization, from which this appeal is taken, was entered.

To establish its case the government introduced evidence, consisting of documentary exhibits, the oral testimony of various witnesses and the deposition of another. De Lucia offered no evidence.

In its memorandum, after a detailed recital of the relevant evidence, the court found (1) that defendant is the Paul De Lucia to whom a certificate of naturalization was granted September 27, 1928 and that he used the name Paul Maglio when he entered this country and when he applied for a certificate of naturalization; (2) that the government has conclusively shown that the defendant, Paul De Lucia, was not Paul Maglio, born July 10, 1898 in Apricena, Italy; (3) that he falsely assumed the name of Paul Maglio to enter this country; (4) that he committed perjury when he stated his name was Paul Maglio in the preliminary papers for citizenship and (5) thereby committed a fraud on the court, and also (6) that the evidence clearly establishes that Paul De Lucia and Felice De Lucia are one and the same person. The court further found (7) that in an application for citizenship it is indispensable that true identity be disclosed, and (8) that the unexplained use of an assumed name by this defendant thwarted investigation as to his eligibility for United States citizenship.

The court pointed out that De Lucia was present in the courtroom throughout the trial and had opportunity to present evidence on his own behalf.

The court stated as a conclusion that De Lucia had not disclosed to the Designated Examiner all the facts material to his application for citizenship and that such failure and misrepresentation foreclosed any further inquiry on the part of the naturalization office.

The court held that the use of De Lucia of a name other than his own, his failure to disclose his true identity, and the concealment of other material facts vitiates the certificate of citizenship granted to him.

While the court did not expressly indicate what it meant by the words "the concealment of other material facts", it is apparent to us from the context of the memorandum that the court had in mind De Lucia's failure to reveal his convictions for homicides in Italy prior to his coming to this country, to which the court had referred in its memorandum.

We are aware that, when the government seeks to deprive a naturalized citizen of his citizenship, it has a burden which must be met with evidence of a clear and convincing character. *Schneiderman* v. *United States*, 320 U.S. 118, 123. From our examination of the record in this case we are convinced that the government has here met its burden. The district court's findings of fact are fully supported by the evidence and, therefore, we are bound by those findings.

Its conclusions of law and the decree which it entered find ample support in the decided federal cases.

The use by an alien of an assumed name to gain entry into the United States, is ground for deportation. *Landon* v. *Clarke*, 239 F. 2d 631, unless satisfactorily explained, *United States* v. *Schlotfeldt*, 94 F. 2d 263. No attempt to explain such use is made in this case. Such use, in attaining citizenship, by naturalization, is sufficient ground for revocation thereof, inasmuch as concealment of one's true name is an effective impediment to an investigation or inquiry relative to the person involved. Had De Lucia used his own name at all relevant times, a path of inquiry leading to his criminal record would have been opened to the government.

The fact that an applicant for citizenship conceals from the government his criminal record is a ground for refusing naturalization, *Stevens* v. *United States*, 190 F. 2d 880, or for ordering denaturalization, *United States* v. *Asher*, 147 F. 2d 544; *United States* v. *Mantalbano*, 236 F. 2d 757; *Corrado* v. *United States*, 227 F. 2d 780; *United States* v. *Accardo*, 208 F. 2d 632, adopting 113 F. Supp. 783.

It seems that De Lucia in this court contends that he cannot be denaturalized because the order of naturalization entered in 1928 is *res judicata*. He supports his contention by citing some of the syllabi from *United States* v. *Kusche*, 56 F. Supp. 201. This effort has brought forth from government counsel this opus:

> "Res judicata, as a defense in these proceedings, literally has been killed by drowning under the inundation of decisions released, first in *Johannessen* v. *United States*, 225 U.S. 227, for fraudulent procurement, in *United States* v. *Ness*, 245 U.S. 319, and in *Maney* v. *United States*, 287 U.S. 17, and *United States* v. *Ginsberg*, 243 U.S. 472, for illegal procurement of citizenship. Wilful misrepresentation and concealment of material facts in these cases have only opened the judicial floodgates wider and killed the defense deader. • • • Surely the defense here has been thoroughly necrotized."

More prosaically we hold that, inasmuch as the denaturalization decree was based upon charges of wilful concealments and misrepresentations by which the entry of the order of naturalization was illegally and fraudulently procured, the latter was not *res judicata* of issues presented in the denaturalization proceeding.

In his brief De Lucia, under Proposition of Law VI, states: "The Trial Court erred in admitting the exhibits and giving them probative value." He cites no authorities in support of this statement. He merely says "See Argu-

ment," without referring to any part of the argument and certainly to no page number. The argument consists of 90 pages of printed matter running continuously without titles or breaks, and we do not feel obligated to attempt to locate the part to which reference is intended to be made by counsel.

Again, he states in Proposition of Law VII, the following:

> "It was error for the Trial Court to allow evidence of custom and to give same probative value."

He cites *Cufari* v. *United States*, 217 F. 2d 404, which furnishes a clue enabling us to locate the part of his argument which pertains to this proposition.

We construe De Lucia's contention that it was error "to allow evidence of custom" to mean that the evidence of custom in this case was inadmissible because it was incompetent. However, only the question of *materiality* (not *competency*) was raised by his objection to the admission of two basic government exhibits, a preliminary form for petition for naturalization, and a document known as a face brief. These documents were introduced by the government on the theory that they were made according to the established custom and practice in the Service.

It is elementary that De Lucia, having objected to the admissibility of these exhibits solely on the issue of materiality, is in no position to raise in this court an objection to their competency as evidence.[3] "Materiality", with reference to evidence, means the property of substantial importance and it has been said that evidence is material where it is relevant and goes to the substantial matters in

---

[3] *Employers Mut Casualty Co* v. *Johnson*, 201 F. 2d 153, 155. 28 U.S.C.A. rule 46 provides

> "* * * it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court * * his objection to the action of the court and his *grounds* therefor; * * *." (Emphasis supplied.)

dispute or has a legitimate or effective bearing on the decision of the same, while evidence is competent if it is fit for the purpose for which it is offered. 31 C.J.S. 868, 906. "Competency", in the law of evidence, is the presence of those characteristics, or the absence of those disabilities, which render a witness legally fit and qualified to give testimony in a court of justice;—applied, in the same sense, to documents or other written evidence. Black's Law Dictionary (1950) 355.

However, it is clear to us that, on the basis of evidence of custom in the naturalization service,[4] these documents were admissible. Nothing in the *Cufari* case indicates that

---

[4] It appears from the testimony of Andrew Jordan, who is a retired district director of immigration and naturalization, that he was familiar with the custom in the naturalization service and knew the handwriting of George McKay (McKay died before the trial) and Stephen Durisch, that on the face brief he made a pencil notation "J" indicating himself and "9-27-28" indicating date of admission on final hearing. He also testified that the initials "G.M." under the heading "Adjournments" and following the words and figures "from APR 10-19-28" were written by examiner McKay, and that the handwriting under the heading "Result of Examination" and the notation "Arr. no" is in the handwriting of examiner Durisch.

In reference to question 24 in preliminary form for petition for naturalization, which reads "Have you ever been arrested?", followed by the word "no" in handwriting, Jordan testified that a pencil check mark above the word "no", according to the practice would indicate that either the preliminary examiner or the designated examiner made the check mark at the time he was questioning the petitioner and that the applicant answered "no".

Durisch testified that all of the handwriting in ink on the front of the face brief is his and that his initials "SD" appear thereon. He further testified that the date August 10, 1920 on the face brief indicates when the naturalization petitioner arrived in the United States and his continuous residence thereafter, and that "Arr. no" means applicant was asked whether he had been arrested and that his answer was "no".

As to the preliminary form for petition for naturalization, Durisch testified that he made black ink marks along the left side of various lines, a procedure governed by instructions, which were for the purpose of showing that the examiner read each question to the applicant, and that the latter's oral answer agreed with that on the preliminary form.

All of this testimony was given without objection.

such records are not admissible. In fact, no such question was there raised. The court said, at 408:

> "The controlling question here * * * is whether Cufari was asked, either at his preliminary examination or at the hearing in the Superior Court of the Commonwealth of Massachusetts, whether he had ever been arrested and had answered in the negative."

The court then, at 409, proceeded to consider a docket slip, being Labor Form 2328 (which is similar to the face brief in this case), and also the testimony of the district director of immigration and naturalization as to the practice of examiners in asking applicants for citizenship if they had ever been arrested and noting applicants' answers on their docket slips. The court did not have before it and did not discuss any question as to the admissibility of such evidence. Hence the *Cufari* case is no authority on that question. As to the *effect* to be given to such evidence, the court held:

> "No doubt Cufari's docket slip coupled with the evidence of the practice and custom of Examiners generally and of Examiners Davis and Mahoney in particular is enough to establish by the balance of the probabilities that Cufari was asked if he had ever been arrested and answered that he had not. * * *"

Thereupon, the court went on to decide the case *upon the foregoing evidence*, considered in connection with the fact that *Cufari, testifying on his own behalf, said that he had no recollection of being asked about arrests either at his preliminary examination or at the hearing on his petition in court.* Differing from the lower court's conclusion, it held that the government had not proved its case by that clear, unequivocal and convincing evidence which did not leave the issue in doubt, and hence it reversed the district court. But in the case at bar, De Lucia did *not* testify and there was no contradictory evidence leaving the issue in doubt.

For the reasons herein set forth, the decree of the district court is affirmed. AFFIRMED.

Opinion of Court of Appeals in Contempt Case Reported in De Lucia v. United States, 256 F. 2nd 489

Before SCHNACKENBERG, HASTINGS and PARKINSON, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* Defendant appeals from an order of the district court adjudging him guilty of contempt of that court on violating an order entered in the case of *United States of America* v. *Paul De Lucia*, then pending in said court, and fining him $500 therefor.

It appears that, while a denaturalization proceeding brought against De Lucia was pending in the district court[1] the government proceeded to take his deposition before a notary public, where he was duly sworn, and that (according to an affidavit of the assistant United States attorney assigned to the prosecution of the denaturalization case), during the course of the examination, government counsel asked De Lucia a series of questions, and that, "on the advice of his attorney William Scott Stewart, and also on his own initiative the defendant refused to answer the questions on the basis of the Fifth Amendment to the Constitution of the United States, asserting that to answer the same would tend to incriminate him."

The examination by government counsel commenced, as follows:

Q. Will you state your name?
A. Paul De Lucia.
Q. Where do you live, sir?
A. 1515 Bonnie Brae, River Forest.

---

[1] An appeal from a judgment against De Lucia in said case was heard in this court. We affirmed ____ F. 2d ____.

Q. Mr. De Lucia, on January 9 of 1925, did you file with the Clerk of the Circuit Court of Cook County a declaration of intention, No. 162822, to become a citizen of the United States of America under the name of Paul Maglio?

A. I respectfully refuse to answer. I don't want to be witness against myself, and I will declare the privilege of the Fifth Amendment.

Q. And at this time, you honestly believe that if you answered that question, you would tend to incriminate yourself?

A. I refuse to answer.

Mr. Stewart: He refuses to answer that question, too.

Mr. Bickley (government attorney): Q. Mr. De Lucia, on February 21, 1928, did you cause to be filed with the District Director of Naturalization in the Federal Building, Chicago, Illinois, your preliminary form for petition for naturalization, No. 379-55072, under the name of Paul Maglio?

A. I refuse to answer for the same reason.

Q. Do you honestly believe that if you answered that question, it would tend to incriminate you?

A. I refuse to answer for the same reason.

The interrogation by government counsel proceeded along the same general lines and the record shows that De Lucia's answer as aforesaid was repeated over 100 times.

The notary public, having certified to the court the aforesaid proceedings, the court, on the government's motion, ordered that defendant answer the oral interrogatories posed at his deposition within three days. Thereafter the government showed De Lucia had failed to answer said interrogatories and moved the court to

enter a rule on him to show cause why he should not be held in contempt of court, upon which motion the court deferred its ruling until after the trial of the denaturalization case. On the same day the court denied defendant's motion for reconsideration of its order requiring defendant to answer oral interrogatories. After the trial in the denaturalization case had ended, the district court allowed the government's motion for a rule to show cause and granted defendant 10 days to answer the rule, which he did. He therein relied, *inter alia*, upon "the privilege guaranteed by the Fifth Amendment". The contempt order followed.

The law is settled that the provision of the Fifth Amendment "that no person * * * shall be compelled in any criminal case to be a witness against himself" must be accorded liberal construction in favor of the right it was intended to secure. *Hoffman* v. *United States*, 341 U.S. 479, 486. It has also been held that the privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime. *Hoffman*, v. *United States*, *supra*, and *Blau* v. *United States*, 340 U.S. 159.

In the *Hoffman* case, the court said, at 486:

> * * * To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. The trial judge in appraising the claim 'must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence.'

It is apparent from the record before us that De Lucia was claiming his privilege under the provision of the Fifth Amendment and that government counsel and the notary public so understood it. He did so against the background of the pending denaturalization proceeding. It is obvious that his answers, if required, would furnish a link in the chain of evidence needed by the government to prosecute De Lucia for a federal crime. To us it appears clear that he was entitled to rely upon the privilege which he claimed. That being so, it was error to adjudge him guilty of contempt of court.

Therefore, the order from which this appeal has been taken, is reversed.

REVERSED.

Opinion of Judge Perry in case at Bar

Petitioner, Paul DeLucia, brings this action under the Declaratory Judgment Act and the Administrative Procedure Act (Title 28 U.S.C., §2201 and Title 5 U.S.C. §1009, respectively) seeking to set aside a deportation order against him and to restrain the District Director from deporting him.

On October 10, 1956, a denaturalization proceeding was filed against Paul DeLucia (hereinafter sometimes referred to as "Petitioner"). The complaint filed pursuant to the provisions of Sec. 340(a) of the Immigration and Naturalization Act of 1952 (66 Stat. 260) 8 U.S.C. 1451(a), prayed for the revocation of an order of the United States District Court for the Northern District of Illinois admitting Petitioner to citizenship and further prayed for the cancellation of the Certificate of Naturalization which was granted to Petitioner on September 27, 1928. The complaint in that proceeding alleged, in part, that Paul DeLucia, formerly known as Felice DeLucia, was born on or about November 14, 1887, in Naples, Italy, as a citizen of Italy; that on or about April 10, 1928, pursuant to the provisions of the Immigration and Nationality Act of June 29, 1906, he filed a petition for naturalization in the name of Paul Maglio, including in his petition a plea that his name be changed to Paul DeLucia; and that he was admitted to citizenship by the United States District Court for the Northern District of Illinois on September 27, 1928.

The complaint in the denaturalization proceeding further alleged:

> "6. That in the proceedings which lead up to his naturalization, the said Paul De Lucia formerly known as Felice De Lucia, alleged under oath:

"a. In his Declaration of Intention dated January 9, 1925, attached to and made part of his petition, that his name was Paul Maglio, and that he had been born in Apricena, Italy, on July 10, 1898.

"b. That in the preliminary form of the petition for naturalization dated February 21, 1928, and while testifying under oath before the naturalization examiner on April 10, 1928, alleged and stated that his full, true and correct name was Paul Maglio, that he had used the name of Paul De Lucia because he 'got married on that name'.

"c. That his mother's name was Torelli, Nunzia Maria; that he was born July 10, 1898, in Apricena, Italy; that he arrived in the United States at New York, New York August 10, 1920, on the SS Ryndam, and further alleged under oath that he had never been arrested.

"d. That in his petition for naturalization executed on April 10, 1928, he alleged under oath that his name was Paul Maglio; that he was born on July 10, 1898, at Apricena, Italy; that he had arrived in New York at the Port of New York City on August 10, 1920, on the Vessel Ryndam and that he was attached to the principles of the Constitution of the United States.

"e. That the allegations of the said Paul De Lucia formerly known as Felice De Lucia, defendant herein, described in the preceding paragraphs were false, untrue and were known by the defendant to be so false and untrue, in the following particulars:

"(1) That in truth and in fact his full true and correct name was not Paul Maglio, but was Felice De Lucia.

"(II) That in truth and in fact the defendant was born November 14, 1897, in Naples, Italy, and not on July 10, 1898, in Apricena, Italy.

"(III) That in truth and in fact his mother's name was Maria Annunziata and not Torelli Nunzia Marie.

"(IV) That in truth and in fact the defendant has been arrested and convicted for voluntary homicide under his true name of Felice De Lucia on May 18, 1917, at Naples, Italy.

"(V) That in truth and in fact the defendant's entry into the United States at New York City on August 12, 1920, was unlawful and there was not attached to his petition for naturalization a certificate of arrival for a lawful entry into the United States for permanent residence.

"7. That the said defendant, Paul De Lucia formerly known as Felice De Lucia, assumed the identity of Paul Maglio, in order to conceal his true identity, to hide from the immigration officers at the time of his arrival and from the naturalization examiners and the Naturalization Court the fact that he previously had been arrested and convicted for voluntary homicide in Naples, Italy, and that he had fled from Italy in order to escape arrest for a subsequent prosecution.

"8. That upon the false and fraudulent representations by the said Paul De Lucia that he was Paul Maglio and that he had never been arrested, and in relying upon the said false and fraudulent representations as set forth heretofore, the Immigration and Naturalization Service did issue a certificate of arrival in the name of Paul Maglio, which the said Paul De Lucia appended to his petition for naturalization."

A trial having been had before the court, Judge LaBuy, in a memorandum opinion reported in 163 F. Supp. at page 36, found, among other things, that the evidence clearly established that the defendant was the Paul DeLucia to whom a Certificate of Naturalization was granted September 27, 1928 and that he he used the name Paul Maglio when he entered this country and when he applied for a certificate of naturalization; that the government had conclusively shown that the defendant, Paul DeLucia, was not Paul Maglio, born July 10, 1898, in Apricena, Italy; that he falsely assumed the name of Paul Maglio to enter this country; that he committed perjury when he stated his name was Paul Maglio in the preliminary papers for citizenship and thereby committed a fraud on the court; that defendant Paul DeLucia voluntarily gave certain information on various occasions which was inconsistent with his identity as Paul Maglio, *viz.*, that he was born in Naples, Italy, on November 14, 1897, that his parents were Anthony and Mary or Maria Annunziata, that he had four sisters whose names were Emily, Anna, Clementine, and Louisa whose ages in 1947 were from 41 to 47 years; and that it had been clearly established that Paul DeLucia and Felice DeLucia are one and the same person. The court further held "that the use by this defendant of a name other than his own, his failure to disclose his true identity, and the concealment of other material facts vitiates the certificate of citizenship granted to him," and, on June 11, 1957, entered a decree of denaturalization.

The decree of the District Court was affirmed by the United States Court of Appeals (256 F. 2d 487) and certiorari was denied by the Supreme Court (358 U.S. 836).

Thereafter Petitioner registered as an alien.

An Order to Show Cause (dated December 5, 1958) which was served on Petitioner on December 10, 1958, contained the following language:

"It appearing, that you are in the United States in violation of law in that:

"1. You are not a citizen or national of the United States;

"2. You are a native of Italy and a national of Italy;

"3. You last entered the United States at New York, New York on August 12, 1920;

"4. You then entered the United States to remain permanently;

"5. You were not then in possession of an unexpired passport or official document in the nature of a passport showing your origin and identity;

"6. You were convicted in the Ordinary Court of Assize at Naples, Italy, on May 18, 1917, for the crime of voluntary homicide; and that you are subject to be taken into custody and deported pursuant to the following provisions of law:

"Section 241(a) of the Immigration and Nationality Act, in that, at time of entry you were within one or more of the classes of aliens excludable by the law existing at the time of such entry, to wit a person who has not presented an unexpired passport or official document in the nature of a passport issued by the government of the country to which he owes allegiance or other travel document showing his origin and identity, as required by the Passport Act of May 22, 1918, and the Executive Order in effect at the time of entry;

"Section 241(a)(1) of the Immigration and Nationality Act, in that, at time of entry you were within one or more of the classes of aliens exclud-

able by the law existing at the time of such entry, to wit a person who has been convicted of a felony or other crime or misdemeanor involving moral turpitude prior to entry into the United States, under sec. 3 of the act of February 5, 1917 to wit: voluntary homicide."

On January 6, 1959, a hearing in deportation proceedings was held at Chicago, Illinois, at which Petitioner was represented by counsel.

Counsel, speaking on behalf of Petitioner, admitted that, as alleged in the Order to Show Cause, Petitioner last entered the United States at New York, New York, on August 12, 1920, and then entered the United States to remain permanently. Admitted for the purpose of the hearing were the allegations that Petitioner is not a citizen or national of the United States and that Petitioner is a native of Italy. Disputed were the allegations that (a) Petitioner was not then in possession of an unexpired passport or official document in a nature of a passport showing his origin and identity; and (b) that Petitioner was convicted in the Ordinary Court of Assize at Naples, Italy, on May 18, 1917, for the crime of voluntary homicide.

Petitioner's counsel and the Examining Officer entered into a stipulation relative to certain testimony and exhibits which were introduced in the denaturalization case of Paul DeLucia in the United States District Court at Chicago, Illinois, that

"Subject, of course, to Mr. Ricca's making any objections to any of the testimony, any of the exhibits in that case we have agreed and have stipulated that all of the witnesses who testified in the United States District Court for the Northern District of Illinois, at Chicago, Illinois, in the case of United States of Amer-

ica *vs.* Paul DeLucia, that the witnesses that testified there would, if they were present here, would testify similarly and that the exhibits that were introduced in that case are offered in evidence in this case and that these exhibits are now to be considered in evidence, subject, of course, to any objections by Mr. Stewart as to their materiality or admissibility."

Additional exhibits (which were not in evidence in the Court case) were also introduced and admitted into evidence by the Examining Officer including, among other things, the transcript of the testimony taken in the denaturalization case with the exception of the deposition of a Mrs. Terribile which was stricken from the record.

The Petitioner claimed privilege under the Fifth Amendment when asked by the Examining Officer under what name he had entered the United States—whether he denied that he entered under the name of Paolo Maglio—what his name was at birth—whether he denied that his true anld correct name was Felice DeLucia—whether he had a passport at the time of his entry at New York, New York, on August 12, 1920, a passport in the name of Felice DeLucia—whether he had at the time of his last entry, at New York, on August 12, 1920, a passport in the name og Paolo Maglio—and whether it was not true that he entered the United States at the Port of New York on August 12, 1920, in the name that was assumed and not his true and correct name. No further questions were asked of him by the Examining Officer.

On January 26, 1959, the Special Inquiry Officer entered an order of deportation, finding that Petitioner's entry in August, 1920, was unlawful and that he was excludable because he did not present a valid passport, and for the further reason that he had been convicted of a crime involving moral turpitude.

An appeal followed, and on August 25, 1959, the Board of Immigration Appeals approved the order of the Special Inquiry Officer and dismissed the appeal.

On August 26, 1959, there was filed in this court a Petition for Review and on October 1, 1959, a First Amended Petition for Review.

This matter is now before the court on the motion of the defendant District Director for a summary judgment.

There is now before this court, and the court has examined in detail, the certified copy of the transcript of the record of the Immigration and Naturalization Service as well as all of the exhibits which were introduced at the hearing in the deportation proceedings.

Petitioner contends that §241 of the Immigration and Nationality Act of 1952, (8 U.S.C. §1251) constitutes retrospective legislation, not within congressional power because of Article I, §9 of the Constitution which provides that "No bill of attainder or *ex post facto* law shall be passed."

As early as 1798 the Supreme Court decided in the case of *Calder* v. *Bull*, 3 Dall. 386, that "*ex post facto* laws have an appropriate significance; they extend to penal statutes and no further; they are restricted, in legal estimation, to the creation, and, perhaps, enhancement of crimes, pains and penalties." Justice Iredell, concurring in that case, added that the true construction of the prohibition as to *ex post facto* laws extends to criminal, not to civil cases.

Deportation is a civil and not a criminal proceeding, and, further, it is not a punishment. In *Bugajewitz* v. *Adams*, 228 U.S. 585, Mr. Justice Holmes said, at page 591:

> "It is thoroughly established that Congress has power to order the deportation of aliens whose presence in the country it deems hurtful. The determina

tion by facts that might constitute a crime under local law is not a conviction of crime, nor is the deportation a punishment. It is simply a refusal by the Government to harbor persons whom it does not want . . ."

In the case of *Mahler* v. *Eby*, 264 U.S. 32, involving an appeal from a judgment of the District Court of the United States for Northern Illinois which dismissed five writs of habeas corpus and remanded the appellants, aliens, to the custody of the Immigration Inspector at Chicago for deportation, Mr. Chief Justice Taft said at page 38:

> "The theory of the draftsman of the petition for the writ and of the assignment of errors was that the same constitutional restrictions apply to an alien deportation act as to a law punishing crime. It is well settled that deportation, while it may be burdensome and severe for the alien, is not a punishment. *Fong Yue Ting* v. *United States*, 149 U.S. 698, 730; *Bugajewitz* v. *Adams*, 228 U.S. 585, 591. The right to expel aliens is a sovereign power necessary to the safety of the country and only limited by treaty obligations in respect thereto entered into with other governments. *Fong Yue Ting* v. *United States*, *supra*. The inhibition against the passage of an *ex post facto* law by Congress in §9 of Article I of the Constitution applies only to criminal laws. *Calder* v. *Bull*, 3 Dall. 386; *Johannessen* v. *United States*, 225 U.S. 227, 242; and not to a deportation case like this. *Bugajewitz* v. *Adams*, 228 U.S. 585, 591."

The 1953 case of *Galvan* v. *Press*, 347 U.S. 522, involved the deportation of an alien who had been a member of the Communist Party from 1944 until some time in 1946 or 1947—a period when it was a political organization and recognized as legal. Mr. Justice Frankfurter, speaking for the court, said at page 530:

> "The power of Congress over the admission of aliens and their right to remain is necessarily very broad, touching as it does basic aspects of national

sovereignty, more particularly our foreign relations and the national security. Nevertheless, considering what it means to deport an alien who legally became part of the American community, and the extent to which, since he is a 'person,' an alien has the same protection for his life, liberty and property under the Due Process Clause as is afforded to a citizen, deportation without permitting the alien to prove that he was unaware of the Communist Party's advocacy of violence strikes one with a sense of harsh incongruity. If due process bars Congress from enactments that shock the sense of fair play—which is the essence of due process—one is entitled to ask whether it is not beyond the power of Congress to deport an alien who was duped into joining the Communist Party, particularly when his conduct antedated the enactment of the legislation under which his deportation is sought. And this because deportation may, as this court has said in *Ng Fung Ho* v. *White*, 259 U.S. 276, 284, deprive a man 'of all that makes life worth living'; and as it has said in *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, 10, 'deportation is a drastic measure and at times the equivalent of banishment or exile.'

"In light of the expansion of the concept of substantive due process as a limitation upon all powers of Congress, even the war power, see *Hamilton* v. *Kentucky Distilleries Co.*, 251 U.S. 146, 155, much could be said for the view, were we writing on a clean slate, that the Due Process Clause qualifies the scope of judicial discretion heretofore recognized as belonging to Congress in regulating the entry and deportation of aliens. And since the intrinsic consequences of deportation are so close to punishment for crime, it might fairly be said also that the *ex post facto* Clause, even though applicable only to punitive legislation, should be applied to deportation."

At this point the court inserted a footnote reading: "First in *Ogden* v. *Saunders*, 12 Wheat. 213, 271, and again in *Satterlee* v. *Matthewson*, 2 Pet. 380, 681 (appendix).

a characteristically persuasive attack was made by Mr. Justice Johnson on the view that the *ex post facto* Clause applies only to prosecutions for crime. The Court, however, has undeviatingly enforced the contrary position, first expressed in *Calder v. Bull*, 3 Dall. 386. It would be an unjustifiable reversal to overturn a view of the Constitution so deeply rooted and so consistently adhered to." And then Mr. Justice Frankfurter continued—

> "But the slate is not clean. As to the extent of the power of Congress under review, there is not merely 'a page of history,' *New York Trust Co. v. Eisner*, 256 U.S. 345, 349, but a whole volume. Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. In the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process. *The Japanese Immigrant Case*, 189 U.S. 101; *Wong Yang Sung v. McGrath*, 339 U.S. 33, 49. But that the formulation of these policies is entrusted exclusively to Congress has become about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government. And whatever might have been said at an earlier date for applying the *ex post facto* Clause, it has been the unbroken rule of this Court that it has no application to deportation."

In view of the decisive language of the Supreme Court, this court overrules petitioner's contention that §241 of the Immigration and Nationality Act of 1952 is unconstitutional as an *ex post facto* measure.

In his complaint, petitioner argues that although under prior Acts there were two grounds for vacating a naturalization decree, *i.e.*, (1) fraudulent procurement and (2) illegal procurement, the 1952 amendment of Section 340(a) (8 U.S.C. §1451(a)) omitted the ground of illegal procurement. As set forth in the 1952 Act the grounds are "that

such order and certificate of naturalization were procured by concealment of a material fact or by willful misrepresentation."

Subsection (i) of aforesaid Section 340 (8 U.S.C. 1451 (i)) provides:

> "(i) The provisions of this section shall apply not only to any naturalization granted and to certificates of naturalization and citizenship issued under the provisions of this subchapter, but to any naturalization heretofore granted by any court, and to all certificates of naturalization and citizenship which may have been issued heretofore by any court or by the Commissioner based upon naturalization granted by any court, or by a designated representative of the Commissioner under the provisions of section 702 of the Nationality Act of 1940, as amended, or by such designated representative under any other act."

This court is of the view that illegal procurement as a ground for denaturalization was saved by Section 405(a) of the Immigration and Nationality Act of 1952. In this connection it should be observed that in the opinion of the Court of Appeals in the denaturalization case (256 F. 2d 487), Judge Schnackenberg said, at page 491:

> "... We hold that, inasmuch as the denaturalization decree was based upon charges of wilful concealments and misrepresentations by which the entry of the order of naturalization was *illegally and fraudulently procured*, the latter was not *res judicata* of issues presented in the denaturalization proceeding." (Italics supplied)

Petitioner claims that he cannot be deported because he has acquired a status which is protected by the savings clause in the 1952 Act. (§405(a), 8 U.S.C. 1101, note)

Section 241 of the 1952 Act (66 Stat. 204, 8 U.S.C. §1251) provides, in part that

"(a) Any alien in the United States . . . shall, upon the order of the Attorney General, be deported who—

"(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;"

The deportation proceeding under review was brought on the grounds that under the above quoted Section 241(a) (1) petitioner at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry in two respects—

(1) a person who has not presented an unexpired passport or official document in the nature of a passport issued by the government of the country to which he owes allegiance or other travel document showing his origin and identity, as required by the Passport Act of May 22, 1918, and the Executive Order in effect at the time of entry; and

(2) a person who has been convicted of a felony or other crime or misdemeanor involving moral turpitude prior to entry into the United States under sec. 3 of the Act of February 5, 1917, to-wit, oluntary homicide.

Section 405(a) of the 1952 Act reads in part as follows:

"(a) Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed . . . to affect any prosecution, suit, action, or proceedings, civil or criminal, brought or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes (sic), conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect.

. . . . . "

and subsection (d) of said Section 405 provides:

> "(d) Except as otherwise specifically provided in this section, the provisions of this section shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a) of this section notwithstanding (1) that any such alien entered the United States prior to June 27, 1952, or (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a) of this section, occurred prior to June 27, 1952."

Discussing a similar claim of status in the case of *Lehmann* v. *Carson*, 353 U.S. 685, Mr. Justice Whittaker said, in pertinent part:

> "Thus, even if we assume that respondent has a 'status' within the meaning of §405(a), that section by its own terms does not apply to situations 'otherwise specifically provided' for in the Act. Section 241(a)(1) specifically provides for the deportation of an alien who 'at the time of entry was . . . excludable by the law existing at (that) time.' • • • And §241(d) makes §§241 a)(1) . . . applicable to all aliens covered thereby, 'notwithstanding (1) that any such alien entered the United States prior to the date of enactment of this Act, or (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act.' It seems to us indisputable, therefore, that Congress was legislating retrospectively, as it may do, (citing in a footnote the cases of *Bugajewitz* v. *Adams*, 228 U.S. 585; *Ng Fung Ho* v. *White*, 259 U.S. 276; *Mahler* v. *Eby*, 264 U.S. 32; *United States ex rel. Eichenlaub* v. *Shaughnessy*, 338 U.S. 521; *Harisiades* v. *Shaughnessy*, 342 U.S. 580; *Galvan* v. *Press*, 347 U.S. 522; *Marcello* v. *Bonds*, 349 U.S. 302) to cover offenses of the kind here involved. This case is, therefore, 'otherwise specifically provided' for within the meaning of §405(a)."

Examining the petitioner's contention that he did have a passport: As a condition precedent to entry to this

country, the Act of May 22, 1918, (22 U.S.C. §§ 223-226), as supplemented by presidential proclamations, required that an alien present a properly visaed passport. As authorized by Section 1(a) of that Act; Executive Order 2932 of August 18, 1918, was issued, Section 5 of which defined a passport as "any document in the nature of a passport issued by the United States or by a foreign government, which shows the identity and nationality of the individual for whose use it was issued." Section 31 of that Order provided that "no alien shall be allowed to enter the United States unless he bears a passport duly visaed in accordance with the terms of the Joint Order of the Department of State and the Department of Labor issued July 26, 1917," and turning to the Joint Order of July 26, 1917, we find that it requires that—

> ". . . . . Every person leaving a foreign country for the United States . . . . with the purpose of entering, passing through or touching at a port of the United States shall be required; before he is permitted to enter the United States, to present a valid passport, or other official document in the nature of a passport, *satisfactorily establishing his identity and nationality* . . . ." (Italics supplied).

From the foregoing it is clear that one of the basic purposes of a passport is to identify the person who bears it. One who presents a passport issued in the name of another is not presenting identification of himself. Petitioner had not previously assumed or used the name of Paul Maglio. He adopted that name and identity only for the express purpose of gaining admittance to this country. The suppression of his own identity was most relevant to his admission to this country because by concealing his true identity he was also concealing his prior criminal record—a record which would have made him excludable. In misrepresenting, as he did, his true identity, he per-

petrated a fraud on the government in obtaining his immigration visa. A passport or visa obtained by means of such relevant misrepresentations and deception is invalid and, as the government argues, is no passport or visa at all. This court is of the view that petitioner had no passport at the time he entered this country.

Petitioner argues that although the decree of denaturalization cancelled his certificate showing admission to citizenship and the order upon which that certificate was based, it left in effect the Certificate of Arrival—that that part of the proceedings of the Naturalization Court concerning the Certificate of Arrival stood as a bar to the entry of the deportation order.

The Certificate of Arrival reflects data which was taken from the registry made by commissioners of immigration in the case of

> "each alien arriving in the United States from and after the passage of this Act (of June 29, 1906) of the name, age, occupation, personal description (including height, complexion, color of hair and eyes), the place of birth, the last residence, the intended place of residence in the United States, and the date of arrival of said alien, and if he entered through a port, the name of the vessel in which he comes. And it shall be the duty of said commissioners of immigration to cause to be granted to such alien a certificate of such registry, with the particulars thereof." (34 Stat. 596)

The Certificate of Arrival in this case was based on data taken from the aforesaid registry, which data, in turn, was based on misrepresentations wilfully made by petitioner to immigration authorities when he entered this country. Certainly there cannot be attributed to such a certificate a veracity which was lacking in the records on which it was based.

It is the view of this court that petitioner's reliance on his Certificate of Arrival as a bar to his deportation is not well placed.—particularly in view of the findings made by Judge LaBuy in the denaturalization case.

In his complaint, petitioner makes the statement: "Assuming for the sake of argument that petitioner was excludable some move was required by law within five years." As pointed out by the government in its brief, the Immigration and Nationality Act of 1952 retroactively expunged prior statutes of limitation and decreed deportation for earlier improper entries, without time limitation. *Lehmann* v. *Carson*, 353 U.S. 685; *Lehmann* v. *Sciria*, 248 F. 2d 519 (C.A. 6, 1957); *Barber* v. *Hong*, 254 F. 2d 382 (C.A. 9, 1958).

Turning, now, to the second ground advanced for petitioner's deportation—that at time of entry he was excludable as a person who has been convicted of a felony or other crime or misdemeanor involving moral turpitude prior to entry into the United States, under sec. 3 of the act of February 5, 1917 to wit: voluntary homicide.

The evidence in this matter indisputably establishes that the petitioner herein is the same person as the Felice DeLucia who was convicted and sentenced in Italy in 1917 for the crime of voluntary homicide on the person of Emilio Perilli and who was convicted in 1924 in Absentia for the crime of voluntary homicide on the person of Vincenzo Capasso.

The fact of petitioner's convictions having been established, it was not within the province of the Special Inquiry Officer to inquire into the circumstances surrounding the homicides. It was his duty to determine only whether or not the crimes for which petitioner had been convicted involved moral turpitude, and this he did.

Since the conviction of the petitioner in 1924 was in Absentia and subsequent to his entry into the United States in 1920, only his 1917 conviction for voluntary homicide is material to the deportable charge. The intentional killing of a human being is a crime the inherent nature of which involves moral turpitude. The petitioner's conviction in Italy in 1917 for voluntary homicide was prior to entry into this country in 1920 and certainly for a crime involving moral turpitude.

In view of the concise language of Section 3 of the aforesaid Act of February 5, 1917, petitioner was excludable at the time of his entry to this country.

This court does not agree with petitioner's contention that the Special Inquiry Officer took evidence in the absence of petitioner and without notice when he obtained and referred to a copy of the Italian statute.

It is the view of this court after an over-all survey of the record and evidence in this matter that the findings of the Special Inquiry Officer and his decision of the petitioner's deportability are based upon reasonable, substantial and probative evidence; that petitioner herein was in all respects accorded a fair hearing and due process of law; that petitioner is deportable; and that the motion of defendant District Director for summary judgment should be granted.

Opinion by Court of Appeals in case at Bar

Before KNOCH, KILEY and SWYGERT, *Circuit Judges.*

SWYGERT, *Circuit Judge.* This is an appeal from a summary judgment sustaining a deportation order. The order was issued after a hearing before a special inquiry officer of the Immigration and Naturalization Service. The respondent, Paul De Lucia, appealed the ruling to the Board of Immigration Appeals. The appeal was dismissed. The respondent thereafter sought a review in the District Court.

The questions presented are: (1) Whether the findings of the special inquiry officer are supported by substantial evidence, (2) whether the retrospective provisions of the Immigration and Naturalization Act of 1952 (8 U.S.C. §1101 *et seq.*) are applicable to an alien excludable at the time of his entry under the Passport Act of 1918 (22 U.S.C. 223-226), and (3) whether the respondent was afforded a fair hearing before the administrative tribunal.

De Lucia, a native and citizen of Italy, entered the United States at New York City August 12, 1920. He was naturalized September 27, 1928, by order of the United States District Court for the Northern District of Illinois. A decree cancelling his certificate of naturalization was entered June 11, 1957, in the same court by Judge LaBuy. *United States v. De Lucia*, 163 F. Supp. 36. The cancellation was based on a finding that respondent falsely assumed the name of Paul Maglio when he entered this country; that he failed to disclose his true identity; and that he concealed other material facts. This Court affirmed. 256 F.2d 487. Certiorari was denied by the Supreme Court. 358 U.S. 836.

The deportation proceeding was initiated by an order to show cause wherein it was charged that respondent when he entered the United States was not in possession of a passport or other official document showing his origin and identity and that he had been convicted of the crime of voluntary homicide and sentenced to prison prior to his entry; that as a consequence he was deportable by reason of §241 (a)(1) of the Immigration and Nationality Act of 1952 (8 U.S.C. 1251) in that he was within one or more of the classes excludable by law existing at the time of his entry, to-wit: A person who had not presented a passport or other travel document showing his origin and identity as required by the Passport Act of 1918 and the Executive Order in effect at the time of entry. (Exec. Order No. 2932, August 18, 1918); also, a person who had been convicted of a crime involving moral turpitude prior to entry as proscribed by Section 3 of the Naturalization and Immigration Act of 1917 (8 U.S.C. 136).

By stipulation of counsel, the transcript of the testimony and the exhibits submitted to Judge LaBuy in the naturalization proceeding with certain immaterial exceptions were made a part of the record considered by the Special Inquiry Officer in the deportation proceeding. Since a recital of this evidence is contained in Judge LaBuy's opinion, it is deemed unnecessary to repeat the evidence in detail here.

Section 1(a) of the Passport Act of 1918 authorized the President to issue rules and regulations covering the entry and departure of all aliens. Pursuant to this authorization, Executive Order 2932 was issued August 8, 1918. Section 5 of the Order defined a passport as one "which shows the identity and nationality of the

individual for whose use it was used. . . ." Section 31 of the Order provided that "no alien shall be allowed to enter the United States unless he bears a passport duly visaed in accordance with the terms of the Joint Order of the Department of State and the Department of Labor issued July 26, 1917." The Joint Order required each alien entering the United States "to present a valid passport or other official document in the nature of a passport, satisfactorily establishing his identity and nationality. . . ."

The Special Inquiry Officer found that respondent at the time he entered the United States did not present a passport showing his true identity in that he was not the person described therein and accordingly, the passport he presented did not meet the requirements of Executive Order 2932. He concluded that, because of this, respondent was not entitled to enter the United States under the provisions of the Order and the underlying Passport Act of 1918, and finally, as a consequence, respondent was excludable under the then existing laws and is presently deportable under the provisions of §241(a)(1) of the Immigration and Nationality Act of 1952.

The evidence showed that in his naturalization petition the respondent stated that his name was Paul Maglio; that he arrived at the port of New York August 10, 1920 on the S.S. Ryndam; that he was born in Apricena, Italy, July 10, 1898; and that his mother's maiden name was Nunzia Maria Torelli. An alien registration form executed by the respondent in 1958 contained the same information as to name and manner of entry. The records of the S.S. Ryndam, which sailed from Boulogne August 1, 1920, listed a passenger under the name of Paolo Maglio who was born in Apricena and whose father was Enrico Maglio.

The respondent did not produce his passport at the hearing as requested. The Officer concluded, however, that he possessed a passport at the time of his entry into this country because, as the evidence showed, if he were not in such possession, he would have been detained at the point of entry for a Board of Special Inquiry and a notation of this would have been made on the ship's manifest.

The evidence also showed that one Paul Maglio exists and that he entered this country August 3, 1920 on the S.S. Duca Degli Abruzzi nine days before respondent's entry; that he was born July 10, 1898 in Apricena, Italy; that his mother's maiden name was Nunzia Maria Torelli; and that his father was Enrico Maglio. This Paul Maglio is not the respondent. The evidence showed that respondent was born Felice De Lucia November 14, 1897, in Naples, Italy; that his mother's maiden name was Maria Annunciata; and that his father was Antonio De Lucia.

This recital of facts makes it apparent that De Lucia materially misrepresented his name, age, birthplace and parentage, and that he assumed the identity of another, namely, Paul Maglio. Accordingly, there was substantial evidence before the Special Inquiry Officer to find that respondent entered this country without a valid passport showing his identity.

The evidence further establishes that respondent is the same person as the Felice De Lucia who was charged in Italy, in 1917, with the crime of voluntary homicide. Felice De Lucia was found guilty by a jury of voluntary homicide "with grave provocation" and carrying a gun "under extenuating circumstances." He was sentenced to imprisonment for a period of three years. The sentence was reduced because of the extenuating circumstances. The Hearing Officer con-

cluded that respondent had been convicted of a crime involving moral turpitude.

It appears from the conviction record that the homicide was voluntarily committed and that a sentence was imposed. The term "voluntary" indicates an intent to kill and the fact that a sentence was imposed negates any possibility that the killing was justifiable. So long as the homicide is voluntary and not justifiable no amount of provocation can remove it from the class of crimes involving moral turpitude. *United States, ex rel. Sollano* v. *Doak*, 5 F. Supp. 561; *Holloway* v. *Holloway*, 126 Ga. 393, 55 S.E. 191. Accordingly, we conclude that there was substantial evidence upon which the Special Inquiry Officer found that respondent was a person who was excludable under under Section 3 of the Immigration Act of February 5, 1917, and therefore subject to deportation under the Immigration and Naturalization Act of 1952.

Respondent contends that the Hearing Officer erred in referring to the Italian Code in his decision as to moral turpitude since no proof of the foreign law was made at the hearing. We do not reach this question because, in our view, it was only necessary for the Hearing Officer to consider the record of conviction and apply the prevalent standards of what constitutes moral turpitude to reach his conclusion.

Respondent argues that Section 405(a) of the 1952 Immigration and Naturalization Act (8 U.S.C. 1101, Note) has preserved to him a status of non-deportability. He further argues that the Act of February 5, 1917 (8 U.S.C. 155) required the government to bring deportation proceedings against an alien within five years of his entry and that it was not the intent of Congress in enacting the 1952 Act to erase this limitation.

Respondent cannot avail himself of the protection contained in the savings provision of Section 405(a). This section provides among other things that prior statutes and statuses shall be continued in force and effect ". . . unless otherwise specifically provided herein. . . ." The Supreme Court in *Lehmann* v. *Carson*, (353 U.S. 685) held that Section 241(a)(1) of the 1952 Act does "otherwise specifically provide" for the deportation of any alien who at the time of entry was excludable by the law existing at that time, and that Section 241(d) makes 241(a) applicable to all aliens "notwithstanding (1) that any such alien entered the United States prior to 1952 or (2) that the facts by reason of which any such alien belongs to an excluded class occurred prior to 1952." The Court concluded that it was "undisputable therefore that Congress was legislating retrospectively, as it may do. . . ."

Respondent attacks the fairness of the administrative hearing with his claim that an improper inference was drawn from his refusal at the hearing to answer questions concerning his entry. Section 291 of the Immigration and Naturalization Act (8 U.S.C. 1361) casts the burden of proof in a deportation proceeding upon the respondent to show the time, place and manner of his entry. It is respondent's contention that his reliance upon the Fifth Amendment in refusing to give additional information resulted in an inference by the Hearing Officer that the Section 291 burden was not met.

Without reaching the question of whether such an inference could be made, it is apparent from the record that the Officer did not rely upon any such inference. He recognized the government's counter burden of

showing unlawful entry and there is ample evidence that this burden was sustained.

While respondent may have been within his rights in refusing to testify at the hearing, it does not follow that his reliance on the Constitutional protection can be used as a weapon to attack the fairness of the hearing in claiming that the government could only discharge its burden of proving his deportability by drawing unwarranted inferences from his refusal to testify.

Respondent contended in the District Court and asserts here that in connection with his naturalization proceeding a certificate of arrival was issued by the immigration authorities verifying the information stated in his application for citizenship and which related to his entry into this country; that this certificate of arrival was part of the basis of the admission order; that Judge LaBuy made no finding in the denaturalization proceeding that the certificate was improperly obtained; and that, accordingly, the admission proceeding pertaining to the certificate stands as a bar to the present deportation. In other words, respondent contends that this constitutes res judicata of lawful entry.

The judgment entered in the denaturalization proceeding cancelling respondent's certificate of citizenship nullifies any basis upon which the doctrine of res judicata can apply. Moreover, a certificate of arrival issued by immigration authorities which is based on records that do not reflect the true facts can in no manner be used to preclude the deportation of an alien who entered the country illegally.

We affirm the District Court's judgment sustaining the order of deportation.

APPENDIX B

Section 241(a), 66 Stat. 204, 8 USC 1251(a):

(4) is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude not arising out of a single scheme or criminal misconduct regardless of whether confined therefor and regardless of whether the convictions were in a single trial.

Section 241(b), 66 Stat. 208, 8 U.S.C. (1952 Ed.) 1251 (b) provides:

(b) The provisions of subsection (a) (4) respecting the deportation of an alien convicted of a crime or crimes shall not apply (1) in the case of any alien who has subsequent to such conviction been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States, or (2) if the court sentencing such alien for such crime shall make, at the time of first imposing judgment or passing sentence, or within thirty days thereafter a recommendation to the Attorney General that such alien not be deported, due notice having been given prior to making such recommendation to representatives of the interested State, the Service, and prosecution authorities, who shall be granted an opportunity to make representations in the matter.

Section 241 (d), 66 Stat. 208, 8 U.S.C. (1952 Ed.) 1251 (d) provides:

(d) Except as otherwise specifically provided in this section, the provisions of this section shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a), notwithstanding (1) that any such alien

entered the United States prior to the date of enactment of this Act, or (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act.

Section 403 (a), 66 (Stat. 280) provides:

The following Acts and all amendments thereto and parts of Acts and all amendments thereto are repealed:

(13) Act of February 5, 1917 (39 Stat. 874).

Section 403 (b), 66 Staf. 280, provides:

(b) Except as otherwise provided in section 405, all other laws, or parts of laws, in conflict or inconsistent with this Act are, to the extent of such conflict or inconsistency, repealed.

Section 405 (a), 66 Stat. 280, 8 U.S.C. (1952 Ed.), 1101 note provides:

(a) Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization, certificate of citizenship, warrant of arrest, order or warrant of deportation, order of exclusion, or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecution, suits, actions, proceedings, statutes (statuses), conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein,

hereby continued in force and effect. When an immigrant, in possession of an unexpired immigrant visa issued prior to the effective date of this Act, makes application for admission, his admissibility shall be determined under the provfsions of law in effect on the date of the issuances of such visa. An application for suspeusion of deportation under section 19 of the Immigration Act of 1917, as amended, or for adjustment of status under section 4 of the Displaced Persons Act of 1948, as amended, which is pending on the date of enactment of this Act, shall be regarded as a proceeding within the meaning of this subsection.

The Immigration Act of February 5, 1917, 39 Stat. 874, provided in pertinent part:

Section 19. That at any time within five years after entry, any alien who at the time of entry was a member of one or more of the classes excluded by law; any alien who shall have entered or shall be found in the United States in violation of this Act, or in violation of any other law of the United States: . . . shall, upon the warrant of the Secretary of Labor, be taken into custody and deported: . . . Provided further, that the provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned . . .

Section 340 (a) of the Immigration and Nationality Act, 8 U.S.C. 1451 (a):

(a) It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 1421 of this title in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person

to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were procured by concealment of a material fact or by wilful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively: Provided, That refusal on the part of a naturalized citizen within a period of ten years following his naturalization to testify as a witness in any proceeding before a congressional committee concerning his subversive activities, in a case where such person has been convicted of contempt for such refusal, shall be held to constitute a ground for revocation of such person's naturalization under this subsection as having been procured by concealment of a material fact or by willful misrepresentation. If the naturalized citizen does not reside in any judicial district in the United States at the time of bringing such suit, the proceedings may be instituted in the United States District Court for the District of Columbia or in the United States district court in the judicial district in which such person last has his residence.

S. 3455, 81st Congress, 1st Sess.

Title III Nationality and Naturalization

Savings Clause

Sec. 361. (A) nothing contained in this title, unless otherwise specifically provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization, certificate of citizenship, or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal brought, or any status, condition, act,

thing or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, acts, things, or matters, the statutes or parts of statutes repealed by this Act are hereby continued in force and effect.

(b) Except as otherwise specifically provided in this title, any petition for naturalization heretofore filed which may be pending at the time this Act shall take effect shall be heard and determined in accordance with the requirements of law in effect when such petition was filed.

(4356-2)

1954-1959 Cumulative Supplement to Fourth Edition of Immigration and Nationality Act, by Sidney Kansas

p. 180 PART 334-A—DECLARATION OF INTENTION

§334a.11 *Preliminary form for declaration of intention.* Each prospective declarant shall, before making and filing a declaration of intention, submit to the Service an application therefor on Form N-300 in accordance with the instructions contained therein. The application may be submitted at any time after the applicant has been lawfully admitted for permanent residence and has attained the age of eighteen years.

§334a.12 *Notification to applicant.* Following approval of the application by the Service, the applicant shall be notified when and where to appear to make and file the declaration of intention.

§334a.13 *Filing of declaration of intention.* A clerk of court or his authorized deputy shall not accept a declaration of intention for filing, unless and until there shall have been received from the Service the applicant's approved Form N-300 authorizing the issuance of the declaration

and showing that the applicant is residing in the United States pursuant to a lawful admission for permanent residence.

§334a.14 *Execution and fee.* The declaration of intention shall be executed by the alien under oath on Form N-315, in triplicate, before the clerk of any court exercising naturalization jurisdiction or his authorized deputy, regardless of the place of residence of the applicant, and only in the office of said clerk. The applicant may sign the declaration and the photographs affixed thereto in any language, or by mark if unable to write. The declarant shall pay the clerk of court, at the time the declaration of intention is filed, the statutory fee of $5.

§334a.15 *Disposition.* The original declaration of intention shall be retained and filed of record by the clerk of court, and the triplicate delivered forthwith to the alien. The duplicate, with Form N-300, shall be forwarded to the appropriate district director on the first day of the month following the month in which the declaration is filed, in accordance with §339.2 of this chapter for inclusion in the declarant's file.

§334a.16 *Declaration of intention; numbering, indexing, binding.* Declarations of intention shall be numbered consecutively in the order in which they are filed in a series separate from petitions. They shall be filed chronologically in separate volumes, indexed, and made a part of the records of the naturalization court.

p. 185 PART 335b—PROOF OF QUALIFICATION FOR NATURALIZATION: WITNESSES: DEPOSITIONS

§335b.1 *Proof of residence and other qualifications—*(a) *Whenever State residence is required.* At the preliminary examination upon the petition for naturalization

before a designated examiner, or if no preliminary examination is held, at the final hearing before the court, residence in the State in which the petitioner resides at the time of filing the petition and the other qualifications required by section 316(a) of the Immigration and Nationality Act during such residence, shall be proved only by the oral testimony of two credible witnesses, citizens of the United States. Residence and other qualifications required by section 316(a) of the Immigration and Nationality Act, for the period prior to such six-month period shall be proved either by depositions taken in accordance with §335b.12 or by the oral testimony of at least two credible witnesses, citizens of the United States. If oral testimony is taken from witnesses who did not verify the petition, affidavits on Form N-451 shall be executed by such other witnesses, in duplicate, before the clerk of the court or the designated examiner, one copy of which shall be attached to the original petition and the other to the duplicate petition.

APPENDIX C

The Immigration and Nationality Act

Sec. 405(a) Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate for naturalization certificate for citizenship, warrant of arrest, order or warrant of deportation, order of exclusion, or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes (statutses), conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act, are, unless otherwise specifically provided therein, hereby continued in force and effect. When an immigrant, in possession of an unexpired immigrant visa issued prior to the effective date of this Act, makes application for admission, his admissibility shall be determined under the provisions of law in effect on the date of the issuance of such visa. An application for suspension of deportation for suspension of deportation under section 19 of the Immigration Act

Nationality Act of 1940

Sec. 347(a) Nothing contained in either Chapter III or in Chapter V of this Act, unless otherwise provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization, or of citizenship, or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any act, things, or matter, civil or criminal, done or existing, at the time of this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, acts, things, or matters, the statutes repealed by this Act are hereby continued in force and effect.

of 1917, as amended, or for adjustment of status under section 4 of the Displaced Persons Act of 1948, as amended, which is pending on the date of enactment of this Act, shall be regarded as a proceeding within the meaning of this subsection.

(b) Except as otherwise specifically provided in title III, any petition for naturalization heretofore filed which may be pending at the time this Act shall take effect shall be heard and determined in accordance with the requirements of law in effect when such petition was filed.

(b) Any petition for naturalization heretofore filed which may be pending at the time this Act shall take effect shall be heard and determined within two years thereafter in accordance with the requirement of law in effect when such petition was filed.

APPENDIX D

Text Book

Immigration Laws of the United States

Second Edition by Frank L. Auerbach, p. 277:

(b) Crime involving moral turpitude. Any crime involving an act intrinsically and morally wrong, or an act done contrary to justice, honesty, principle, or good morals, is a crime involving moral turpitude (*Malim in se*). It is to be distinguished from an act which is not inherently immoral, but becomes an offense only because its commission is expressly forbidden by law (*Malum Prohibitum*). The violation of statutes which merely license or regulate and impose criminal liability without regard to evil intent does not involve moral turpitude. Whether a crime, committed in the United States or abroad, involves moral turpitude under the immigration laws is determined by standards prevailing in the United States.

The courts have set certain standards which must be followed in determining whether a crime involves moral turpitude. First a determination has to be made what law or specific portion of law has been violated, and then without regard to the act committed by the alien, whether that law inherently involves moral turpitude. The latter determination must include a finding whether the violation of law "under any and all circumstances" involves moral turpitude If it is found that the violation of the law under any and all circumstances involves moral turpitude then all convictions under that law involve moral turpitude. If, however, it is found that the particular statute punishes acts which do not involve moral turpitude, as well as those which do, then no conviction under that law involves moral

turpitude, although in the particular instance the conduct was immoral.

If under a given statute serious and nonserious crimes, *i.e.*, those involving moral turpitude and those not involving it, cannot be separated or distinguished, the statute must be taken at its minimum. If, on the other hand, the provisions of the statute are divisible or separable and so drawn as to include within its definition crimes which do and some which do not involve moral turpitude, the record of conviction may be examined to determine which provision of the statute is involved. • • •

p. 281

(d) Conviction in absentia. A conviction in absentia of a crime involving moral turpitude does not constitute a conviction within the meaning of Section 212. (a) (9). (22 CFR 41.91 (a) (9) (v) and 42.91(a) (9) (vi). • • •

p. 283

(h) Juvenile delinquencies not crimes. Prior to the enactment of the Immigration and Nationality Act, it was a well established administrative holding that juvenile delinquencies are not considered to be crimes within the meaning of the Immigration laws. The Board of Immigration Appeals and the Department of State hold that the Immigration and Nationality Act has made no change in the determination. Consequently, aliens who have been found to be juveniles and have been treated as juvenile offenders in the deposition of their cases are not considered as having been "convicted of a crime involving moral turpitude."

p. 284

(i) • • • A sentence which has been suspended by the court at the time of imposing sentence is not regarded as having been "actually imposed" within the meaning of Section 4.

APPENDIX C.

Certificate of Arrival for Naturalization Purposes.

This certificate is for the use of the person applying for it only, and is issued for naturalization purposes in compliance with place, and matter of arrival in the United States.

U.S. DEPARTMENT OF LABOR
BUREAU OF NATURALIZATION
CERTIFICATE OF ARRIVAL DIVISION
ELLIS ISLAND, NEW YORK.

This is to certify that the following named alien arrived in the United States on the date and in the manner described below, at Ellis Island, New York. Name of Alien, Maglio, Paola. Date of Arrival for permanent admission, August 10, 1920 Manner of Arrival Ryndam.

By Direction of the Secretary of Labor.

506911 Raymond F. Christ
Commissioner of Naturalization

We quote from the record made before Judge Wilkerson (App. 219):

"Order Of Court Admitting Petitioner.

Upon consideration of the petition of Paul Maglio and affidavits in support thereof, and further testimony taken in open Court it is ordered that said petitioner, who has taken oath required by law, be, and hereby is, admitted to become citizen of the United States of America this Sept. 27, 1928.

It is further ordered, upon consideration of the said Paul Maglio that his name be, and hereby, is, changed to Paul DeLucia under authority of the provisions of Section 6 of the Act approved June 29, 1906. (34 Stat.

L. pt. 1. p. 596) as amended by the Act approved March 4, 1913, entitled 'An Act to create a Department of Labor.'"

The judgment entered by Judge Wilkerson is as follows (App. 217):

"Be it remembered, that Paul DeLucia, then resident at number 905 So Halstead Street, (city town) of Chicago, State of Illinois; who previous to his her naturalization was a citizen subject of Italy, having applied to be admitted a citizen of the United States of America pursuant to law, and at a Regular term of the District Court of the United States, held at Chicago, on the 27th day of September, in the year of our Lord nineteen hundred and 28, the court having found that the petitioner intends to reside permanently in the United States, and that he had in all respects complied with the Naturalization Laws of the United States, and that he was entitled to be so admitted, it was thereupon ordered by the said court that he be admitted as a citizen of the United States of America.

In the Testimony Whereof the seal of said court is hereunto affixed on the 27th day of September in the year of our Lord nineteen hundred and 28, and our Independence the one hundred and fifty-third."

APPENDIX D.

In the

United States Court of Appeals

For the Seventh Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

PAUL DE LUCIA,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 12093

MOTION FOR LEAVE TO FILE PETITION UNDER RULE 60(b) IN THE DISTRICT COURT

Now comes Paul DeLucia, by Wm. Scott Stewart his attorney and requests leave to file a petition in the District Court pursuant to Rule 60 (b) Federal Rules of Civil Procedure.

PAUL DELUCIA
Plaintiff-Appellee

BY

WM. SCOTT STEWART
Attorney for Plaintiff-Appellee.

SUGGESTIONS

in support of Motion for leave to file petition

1. For reasons disclosed in the various briefs filed in causes No. 12093, 12094 and 13365 counsel is of the opinion that substantial questions may be presented by virtue of clauses (1), (4), (5) and (6) of Rule 60 (b), Federal Rules of Civil Procedure.

2. The decree to be thus attacked has been affirmed by this Honorable Court. *United States* v. *DeLucia*, 256 F. 2d 487, cert. denied 358 U.S. 836. The rule

is stated in *Butcher & Sherrerd* v. *Welsh*, 206 F. 2nd 259, Aff'd 206 F. 2nd 259. But see also *Ginsberg* v. *Stern*, 242 F. 2nd 379.

3. If the said decree were set aside, DeLucia would cease to be subject to the jurisdiction of the Administrative body and therefore the deportation order would be void.

4. A petition filed pursuant to Rule 60 (b) might restore jurisdiction in the District Court in order that findings of fact and conclusions of law might be made defining the jurisdiction of the District Court. The subsequent deportation proceedings have made it necessary to have a clearer statement of what was intended by the decree entered by Judge LaBuy.

5. Not only was *James* v. *United States*, 366 U.S. 213, decided after Judge LaBuy entered his decree and this Honorable Court affirmed, but it is significant to note that the Supreme Court expressed the effect of a change of judicial attitude after Your Honors had decided the *James* case, without having the point called to the attention of this Honorable Court. It is reasonable to conclude that if Judge LaBuy had had the benefit of the *James* case and if the *James* case had been before Your Honors, the result would have been different.

6. We seek a decision not only based upon a change in judicial attitude, as expressed by the Supreme Court, but based also on the effect to be given to changes made in the law by Congress.

7. In *United States* v. *Polites*, 24 F.R.D. 401, affirmed 272 F. 2nd 709 an alien filed a motion under 60(b) (5) and (6) for relief from a judgment cancelling his citizenship. The alien at the time was resisting an order of deportation. Judge Picard in denying the petition said, p. 404:

> "Ordinarily we would have granted petitioner's prayer * * *"

but for the fact that petitioner had abandoned an appeal in the denaturalization case.

8. We trust that a decision on this motion by Your Honors will pave the way for further proceedings, either in the District Court or in the Supreme Court, by way of an additional petition for the Writ of certiorari.

IN THE

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Paul De Lucia, Plaintiff-Appellant	)	
v.	)	No. 13365
Wilbor T. Flagg, District Director, etc. Defendant-Appellee	)	and No. 12093

GOVERNMENT'S ANSWER IN OPPOSITION TO DEFENDANT'S MOTION FOR LEAVE TO FILE PETITION UNDER RULE 60(b) IN THE COURT BELOW.

United States of America, plaintiff-appellee in No. 12093, in opposition to defendant's motion for leave to file a petition under Rule 60(b) in the court below, says as follows:

1. The motion for leave and the suggestions in support thereof do not state a claim upon which relief can be granted.

2. Insofar as the proposed leave to file a motion under Rule 60(b) the Government points out that Rule 60(b)(1), predicated on mistake, inadvertence, or excusable neglect, expressly provides that the motion under 60(b)(1) must be made "• • • not more than one year after the judgment, order or proceeding was entered or taken", and insofar as the motion is predicated on 60(b)(4), (5) and (6), it is not made within a reasonable time after judgment as required expressly by the Rule. It is to be remembered that the opinion of this Court affirming the judgment of denaturalization against defendant was filed on June 18, 1958.

3. The defendant in his Suggestions brings nothing new to the Court. There has been no significant change in the law of denaturalization or deportation affecting this defendant since this Court's decision in *U.S.* v. *De Lucia* filed on June 18, 1958. (256 F. 2d 487.) Of significance in this

regard is the language of the Ninth Circuit in *Title* v. *U.S.*, 9 Cir., 263 F. 2d 28, 31:

> "Appellant recognizes that there are reasons of public policy for assuring the finality of judgments, but suggests that under Rule 60(b)(5), Fed.R.Civ.P., 28 U.S.C.A., a special rule should be adopted in denaturalization cases relaxing the strictness of the ordinary rule. In support of this, appellant refers to the language of the dissenting Justices in *Ackerman* v. *United States*, 1950, 340 U.S. 193, 202, 71 S.Ct. 209, 95 L.Ed. 207. We are, of course, bound by the majority opinion in Ackermann, just as we are in Zucca. Rule 60(b) was not intended to provide relief for error on the part of the court or to afford a substitute for appeal. *Ackermann* v. *United States, supra; Morse-Starrett Products Co.* v. *Steccone*, 9 Cir., 1953, 205 F.2d 244, 248-249; *Berryhill* v. *United States*, 6 Cir., 1952, 99 F.2d 217; *Loucke* v. *United States*, D.C.S.D.N.Y. 1957, 21 F.R.D. 305. Nor is a change in the judicial view of applicable law after a final judgment sufficient basis for vacating such judgment entered before announcement of the change. *Collins* v. *City of Wichita, Kansas*, 10 Cir., 1958, 254 F.2d 837; *Berryhill* v. *United States, supra; Loucke* v. *United States, supra.*"
>
> *Title* v. *U.S.*, 9 Cir., 263 F.2d 28, 31.

4. It is a settled rule that a change in the judicial view of applicable law after final judgment, and such is not the case here, we submit, is not a basis for vacating a judgment or decree, and affirmance thereof, entered before announcement of the change. *Sunal* v. *Large*, 332 U.S. 174; *Berryhill* v. *U.S. et al.*, 6 Cir., 199 F.2d 217, 219; *U.S.* v. *Kunz*, 2 Cir., 163 F.2d 344.

A further exhaustive treatment of the entire problem of post-appeal review by way of filing a petition under 60(b) of the Federal Rules of Civil Procedure is given by the Supreme Court in *Ackermann* v. *U.S.*, 340 U.S. 193.

Respectfully submitted,

James P. O'Brien
United States Attorney

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois
Thursday, January 11, 1962
Before
Hon. Win G. Knoch, Circuit Judge
Hon. Roger J. Kiley, Circuit Judge
Hon. Luther M. Swygert, Circuit Judge

PAUL DeLUCIA,
Plaintiff-Appellant,
No. 13365 vs.
W. T. FLAGG, District Director, etc.,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

It Is Ordered by the Court that the petition of plaintiff-appellant Paul DeLucia for a rehearing of this cause, filed herein on December 18, 1961, be, and the same is hereby denied.

It Is Further Ordered by the Court that the motion of plaintiff-appellant Paul DeLucia for a stay of the issuance of the mandate, which motion is printed as a part of plaintiff-appellant's petition for a rehearing filed herein on December 18, 1961, be, and the same is hereby granted, and the issuance of the mandate of this Court in this appeal is hereby stayed for a period of thirty (30) days pursuant to Rule 28 of the Rules of this Court.

It Is Further Ordered by the Court that the motion of plaintiff-appellant Paul DeLucia to transfer exhibits, which motion is printed as a part of plaintiff-appellant's petition for a rehearing filed herein on December 18, 1961, be, and the same is hereby granted, and the Clerk of this Court is authorized and directed to certify the exhibits and briefs of the parties to this appeal to the Supreme Court of the United States.

It Is Further Ordered by the Court that the motion of defendant-appellant Paul DeLucia for leave to file petition under Rule 60(b) of the Federal Rules of Civil Procedure in the District Court, which motion is entitled in Appeal No. 12093—United States of America, Plaintiff-Appellee vs. Paul DeLucia, Defendant-Appellant, and is printed as a part of the petition for rehearing filed herein on December 18, 1961, be, and the same is hereby denied.

APPENDIX E.

History of the Savings Clause in the McCarran Act.

1. *S. 3455, 81st Congress, 1st Session, Section 361.** This Honorable Court observed in *United States* v. *Menasche*, 348 U.S. 528, 532 (1954), that section 347 of the Nationality Act of 1940 (8 U.S.C. 747) was the direct antecedent of the 1952 Act savings clause. A comparative print of the two savings clauses is set forth in Appendix D herein. The 1940 Act savings clause was originally taken verbatim and placed in the naturalization title (Title III) of the first McCarran bill (S. 3455, 81st Congress, 1st Session, Section 361). The full text of these provisions is set forth in Appendix E to this petition. The only changes made in S. 3455 were (a) the addition of the words "status and condition" and (b) the provision that it was to apply "unless otherwise specifically provided" in the naturalization title (Title III). As worded and as set forth in Title III, the savings clause was strictly limited to nationality and naturalization matters.

In S. 3455, Section 402(a)(13), 402(a)(23) and 402(a)(39) repealed the existing immigration laws without any savings clause. The repeal of pre-existing laws without a savings clause or a retroactive provision would have rendered previously deportable aliens immune. *United*

* We are indebted to Messrs. Henry C. Lavine, Jack Wasserman and David Carliner for this material heretofore briefed by them for Your Honors in *Lehmann* v. *Carson*, 353 U.S. 685.

States v. Reisinger, 128 U.S. 398, 480 (1888). Accordingly, to cover deportable aliens under pre-existing law, it was necessary to provide in section 241(d) that the grounds of deportation be retroactive. This was the purpose of section 241(d) as revealed by its legislative history. Aliens deportable under pre-existing laws were to remain deportable. S. 3455 further reveals that 241(d) was there set forth as in the final version of the law. It was not drafted to carve out a savings clause exemption because when it was prepared, there was no savings clause for deportation cases.

2. *S. 716, 82nd Congress, 1st Session.* S. 716 removed the savings clause from the nationality section of the bill and placed it in section 405, making it applicable to the entire Act, rather than to the nationality section alone.

To the repealing section (403) was added a paragraph (b) reading:

> "Except as otherwise provided in section 405, all other laws, in conflict or inconsistent with this Act are, to the extent of such conflict or inconsistency repealed."

To section 405 there was added the phrase "right in process of acquisition." In addition the following were also to be preserved under the old law:

> "warrant of arrest, order or warrant of deportation, order of exclusion, or other documents or proceeding which shall be valid at the time this Act shall take effect. . . ."

3. *S. 2550, 82nd Congress, 2d Session.* S. 2550 added a further sentence to the savings to the savings clause reading as follows:

> "An application for suspension of deportation under section 19 of the Immigration Act of 1917, as amended, or for adjustment of status under section 4 of the Displaced Persons Act of 1948, as amended, which is pending on the effective date of this Act, shall be regarded as a proceeding within the meaning of this subsection."

The 1952 Savings Clause Is the Broadest Ever Enacted by Congress.

1. The foregoing analysis of the successive stages through which the 1952 savings clause passed in the various drafts of the bills which led to the enactment of the 1952 Immigration and Nationality Act shows that each bill enlarged the savings clause. From a savings clause limited to nationality matters, it was expanded into one covering the whole field of immigration and nationality. From a bill limited to proceedings, acts, things, and matters, it was expanded to one covering warrants of arrest, orders of deportation and exclusion, suspension and displaced persons' applications, statuses, conditions, and rights in process of acquisition.

2. The history of other immigration and nationality savings clauses outlined in *United States* v. *Menasche*, 348 U.S. 528 at 532 (1954), demonstrates, as this Honorable Court concluded, that the:

> "1952 Act made the enumeration of matters preserved • • • more complete and all inclusive"

and that the

> "consistent broadening of the savings provision, particularly in its general terminology, indicates that this policy of preservation was intended to apply to matters both within and without the specific contemplation of Congress." 348 U.S. at 533, 535.

Judge Stewart in *United States* v. *Kershner*, 228 F. 2d 142, 146, said:

> "Other federal courts have uniformly given a broad interpretation to section 405 in varying factual situations. See *United States ex rel. DeLucia* v. *O'Rourke*, 213 F. (2d) 759 (8 Cir., 1954); *Yanish* v. *Barber*, 211 F. (2d) 467 (9 Cir., 1954); *Ex parte Robles-Rubio*, 119

F. Supp. 610 (N.D. Cal., 1954); *Vanish* v. *Barber*, 128 F. Supp. 240 (N.D. Cal., 1955); *Petition of Pringle*, 122 F. Supp. 90 (E.D. Va., 1953), affirmed *per curiam sub nom. United States* v. *Pringle*, 212 F. (2d) 878 (4 Cir., 1954). On occasion, this uniformly broad interpretation has led to a result adverse to the alien. See *United States* v. *Matles-Freidman*, 115 F. Supp. 261 (E.D.N.Y., 1953); *United States ex rel. Circella* v. *Neely*, 115 F. Supp. 615, 625-626 (N.D. Ill., 1953)."

• • •

"Moreover, if there be deemed to exist any reasonable doubt as to whether Congress intended to make an alien deportable, that doubt should be resolved in his favor. *Fong Haw Tan* v. *Phelan*, 1948, 333 U.S. 6, 10."

One issue here is whether Congress has preserved petitioner's residence in Chicago or taken it away. Petitioner not only resided here, he filed his Declaration of Intention in 1925 (App. 267) and his Preliminary Form for Naturalization in 1928 (App. 206). A conflict in derivative citizenship cases was between *U. S. ex rel. Aberasturi* v. *Cain*, 147 F. 2d 449 (C.A. 2, 1945), which declined to preserve under the 1940 savings clause "a mere condition unattended by any affirmative action by the alien or by anyone else," and *Bertoldi* v. *McGrath*, 178 F. 2d 977 (C.A.D.C., 1949), which reached a contrary result.

We quote from *United States* v. *Menasche*, 348 U.S. 528, 535:

"It should be noted, further, that the conflict between *Aberasturi* and *Bertoldi*, involved a situation where the alien had failed to take any affirmative action to assert his claim to citizenship. Even the more restrictive *Aberasturi* opinion recognized that affirmative action by the alien might alter the result there reached. 147 F. 2d at 542. If Congress was willing to preserve a 'mere condition unattended by any affirmative action,' we think its savings clause also reaches

instances, such as this, where affirmative action is present. * * * (536) It could be argued in the present case that it was Menasche's residence, rather than his filing of the declaration, which gave rise to this right under § 405 (a). And this approach would have the virtue of eliminating the inequitable treatment envisaged by the Government as regards those special groups of aliens who did not have to file declarations as a prerequisite to citizenship. But while our decision could be rested on this ground, it is sufficient here merely to refer to the provision in §405(a), derived verbatim from §347(a) of the 1940 Act, preserving the 'validity' of the declarations of intention 'valid at the time this Act shall take effect.' "

By the provisions of Section 19 of the Immigration Act of 1917 (8 U.S.C. 155) Congress expressly limited deportation of illegal entrants to a period within five years after entry. In the same manner Congress relieved from deportation those aliens convicted of crime, who had been pardoned. The savings clause, which expressly preserved any existing status or condition and which expressly continued in effect as to such status or condition the Act of 1917, represents a reaffirmation by Congress of its policy "not to strip aliens of advantages gained under prior laws." *United States* v. *Menasche*, 348 U.S. 535.

The term status has a long history in immigration terminology, and it is rich in legal meaning. "Whenever a condition in life is determined by law, and not by act of the parties it is correctly denominated a status in jurisprudence; and even in the terminology of the common law itself." *In re Zeigler*, 143 N.Y.S. 562, 567, 82 Misc. 346 (1913). There is the status of husband and wife, marital status, the status of parent and child, of adoption and guardianship. *Restatement of Conflict of Laws*, p. 181, 182. We speak of the status of an alien, *Harisiades* v. *Shaugh-*

nessy, 342 U.S. 580, 586 (1951), enemy alien status, *Shomberg* v. *United States*, 348 U.S. 540, 547 footnote 5 (1954), *the status of citizenship or eligibility for citizenship Heikkila* v. *Barber*, 345 U.S. 229, 236 (1952), the status of a continuous resident (alien) physically present in the United States, *Kwong Chew* v. *Colding*, 344 U.S. 590, 600, 601 (1950) and legal status to institute or maintain a lawsuit. *Doremus* v. *Board of Education*, 342 U.S. 429, 436 (1951).

The term is no stranger to those familiar with our immigration laws and practices. For years our immigration authorities have maintained a status section in its Washington and district offices charged primarily with supervision of the status of aliens here on temporary basis. *Immigration Manual* (1946), p. 1011. As early as 1926 immigration regulations were concerned with the status of visiting aliens, *U.S. ex rel. Lam Shin Hing* v. *Corsi*, 4 F. Supp. 591, 593 (S.D.N.Y., 1933). Immigration decisions speak of status as an alien, *Matter of C., V, I&N* Dec. 370, 371; diplomatic status, *Matter of S.H.C.C.IV, I&N*. Dec. 36, 42; status as a student visitor, *Matter of A.I.C. IV, I&N*. Dec. 630, 631; and non-immigrant status, *Matter of DeP., I&N*. Dec. 151.

Senate Report 1515, 81st Congress, 2d Session, p. 491, which preceded the introduction of the bills culminating in the 1952 Immigration and Nationality Act, devotes a chapter to "adjustment of status." It is there stated:

> "Legality of status is a matter of degree. Most aliens in this country are here lawfully for all purposes. A few are eligible for re-entry documents, but do not have status sufficient for naturalization purposes; a large number are eligible neither for naturalization nor re-entry documents, but still are not deportable; and many are subject to deportation,

yet eligible to have that status changed without deportation.'

"Status may be adjusted by administrative procedure, treaty, registry, suspension of deportation, voluntary departure or preexamination, change of status, or an act of Congress."

Thus, Congress, itself, placed aliens subject to deportation in a status. By the same token those not deportable had a status and it is significant that the 1952 Immigration and Nationality Act, and particularly the immigration sections frequently use the term status.

Of course, with or without express authority from Congress, courts would recognize a change of status recognized and established by a Naturalization Court.

Section 101(a)(20) (8 U.S.C. 1101) (a) (20) refers to the status of lawful permanent residence, section 101 (a) (27) (c) (8 U.S.C. 1101) (a) (27) (c) to non quota status, and section 204 (8 U.S.C. 1154) to immigrant status.

Chapter 5 which precedes section 241 (8 U.S.C. 1251) is headed "Deportation; Adjustment of Status." Section 241 (a) (9) (8 U.S.C. 1251) (a) (9) provides for the deportation of aliens who have violated their status as nonimmigrants. Section 244 (8 U.S.C. 1254) authorizes the adjustment of status of deportable aliens. Sections 245 and 246 (8 U.S.C. 1255, 1256) provide for the adjustment of status from nonimmigrant to permanent resident and the rescission of such adjustment. Section 247 (8 U.S.C. 1257) authorizes the adjustment of status from permanent resident to non-immigrant. Section 360 (a) (8 U.S.C. 1503a) refers to the status of a national of the United States. Finally, the 1952 Act savings clause itself preserves applications for adjustment of status under the Displaced Persons Act (50 U.S.C. App. 1953).

Existing Conditions Preserved.

The 1952 savings clause preserves pre existing conditions. If petitioner did not acquire a status, certainly the preservation of his condition of nondeportability is covered by the savings clause. Condition is defined by lexicographers as meaning "state of being," "characteristics" or "situation in relation to environment." *

It frequently is employed legally to denote a circumstance or situations. *P. Dougherty Co.* v. *United States*, 207 F. 2d 626, 630 (C.A. 3, 1953). It has been described as a word of flexible meaning and indefinite application. *Great Eastern Casualty Co.* v. *Smith*, 174 S.W. 687, 688 (Tex. Civ. App. 1915). The elasticity of the term "condition" in the context of the savings clause here involved, certainly encompasses petitioner's situation of nondeportability.

Existing Rights in Process of Acquisition Preserved.

In *Bertoldi* v. *McGrath*, 178 F. 2d 977, a savings clause of more narrow scope was held to cover inchoate rights or those in process of acquisition.

This Honorable Court observed in *United States* v. *Menasche*, 348 U.S. 528, 535, that under the savings clause the statutory status quo was to continue to rights not fully matured." In *United States ex rel. Zacharias* v. *Shaughnessy*, 221 F. 2d 578, 580 (C.A. 2, 1955), an alien illegally in the United States was held to have a status or right in process of acquisition by reason of steps taken by his wife to secure a visa. Petitioner's position is stronger. Unlike Zacharias who was deportable under existing law, petitioner had acquired a status or condition of nondeportability. He had a long residence here. By appropriate

* Websters Universal Dictionary, Oxford Universal English Dictionary.

further status he could and still can utilize that residence and nondeportable status for naturalization purposes. Moreover, Congress continued its desire to accord favored treatment to aliens who had come here as petitioner did, prior to 1924.

It is unreasonable to suppose that Congress would reverse its long standing policy towards excludable aliens who entered this country prior to July 1, 1924, otherwise than by a plain and specific declaration of its purpose to do so. *U. S. ex rel. Scoria* v. *Lehmann*, 136 F. Supp. 462. Such aliens have been permitted to become lawful permanent residents by registry proceedings under 8 U.S.C. 728 b (1946 Ed.) and 8 U.S.C. 1259 (1952 Ed.)

Accordingly, warrants of deportation under the prior law issued after a deportation case was finally determined (8 C.F.R. 1952 Ed. 243. 1) were specifically preserved. Warrants of arrests initiating the deportation proceeding (8 C.F.R. 1952 Ed. 242. 1) were specifically kept in force under the old law under the savings clause. The deportation proceeding itself and statuses were likewise preserved. The savings clause specifically reads that unless otherwise specifically provided, nothing shall affect the validity of any

> "warrant to arrest, order or warrant of deportation, order of exclusion, or other document or proceeding which shall be valid at the time this Act shall take effect."

Valid at the time the McCarran Act took effect was a proceeding for the naturalization of petitioner, together with the necessary documents to support steps taken by petitioner in order to become a citizen.

The Retroactive Deportation Provisions of Section 241 Specifically Provide an Exception to the Savings Clause.

It is our view that section 241 (8 U.S.C. 1251) of the 1952 Immigration and Nationality Act did not otherwise specifically provide for the deportation of those protected by the savings clause. Some provisions of section 241 are retroactive and others are not.

Where prospective application of section 241 was desired, the word "hereafter" was used. Except as provided in section 241, section 241 (d) made the deportation provisions retroactive. However, we do not reach the retroactive provisions of the new law unless the new law applies. We must, therefore, first determine which law is applicable. The savings clause preserves the statutory *status quo* and prevents the operation of the 1952 Act unless "otherwise specifically provided." *United States* v. *Menasche*, 348 U.S. 528, *Shomberg* v. *United States*, 348 U.S. 540. The heart of the issue herein, then, is not whether section 241 is retroactive, but rather whether the old or the new law governs. Stated otherwise, the issue is whether the mere retroactivity of section 241 (d) constitutes sufficient specificity to preclude operation of the savings clause.

Means of Words "Otherwise Specifically Provided."

In section 403(b) Congress stated that section 405 applied "except as otherwise provided." In the Nationality Act of 1940, 8 U.S.C. 747 a, the savings clause applied, "unless otherwise provided." However, in enacting section 405 Congress twice stated that it was to apply" unless otherwise *specifically provided*." Unless otherwise *specifically* provided, the prior legislation was to govern. Unless otherwise *specifically* provided the existing status, condition, and right in process of acquisition were to remain valid.

The word, "specifically," meant something to Congress when it added it to the savings clause and when it inserted it in section 405 and not in section 403, or in other legislation. It is a term which demands precision. The word "specifically" as defined by the lexicographers and judicial decisions is equivalent to the word "precisely" or "expressly."*

Section 241 is not precise in carving an exception to the savings clause. On the contrary, it makes no reference to if at all. It is not explicit in directing whether aliens who have acquired an adjusted status or a nondeportable status under prior legislation and under judicial recommendations are not to become deportable. *U. S. ex rel. DeLuca v. O'Rourke*, 213 F. 759 (C.A. 8 1954); *U. S. ex rel. Carson v. Kershner*, 228 F. 2d 142 (C.A. 6, 1955); *U. S. ex rel. Scoria v. Lehmann*, 136 F. Supp. 458 (N.D. Ohio, 1955).

Legislative History of Omission of Explicit Exception to Section 405.

Section 241 did not and could not specifically suspend the operation of the savings clause when it was originally drafted. In its original form, S. 3455, 81st Congress, 1st Session, contained Section 241(d), but no deportation sav-

---

* Specifically means in a specific manner, explicitly, particularly, definitely. *Straton v. Hodgkins*, 109 W. Va. 536, 155 S.E. 902 (1930). "Specific implies precise or explicit designation." *Melnick v. Melnick*, 147 Pa. Supp. 564, 25 A.2d 111 (1942). Specific means precisely formulated or restricted, definite, explicit, or an exact or particular nature. *People v. Thomas*, 25 Cal. 2d 880, 889, 156 P. 2d 7, 17 (1945). "The word 'specifically' is equivalent to the word 'definitely' or 'precisely'." *Emack v. Campbell*, 14 App. D.C. 186, 190 (1889).

The Century Dictionary and Encyclopedia defines specifically as meaning "particularly, definitely, explicitly." Funk and Wagnalls Standard Dictionary defines it as "expressly, explicitly, particularly, definitely."

ings clause. The savings clause for deportation cases was inserted in subsequent drafts. Nevertheless, after the savings clause was added and expanded in these subsequent drafts of the bill, no attempt was made to have 241(d) explicitly carve an exception to 405 by a cross reference to that section. The omission of any cross reference or explicit exception to section 405 is significant.

Statutory Scheme For Exemption From Savings Clause.

In the drafts which followed S. 3455 Congress methodically reviewed the various statutory provisions of the 1952 Act and carved out exceptions. In *Shomberg v. United States*, 348 U.S. 540 at 547 (1954), this Honorable Court noted that Congress had established a statutory scheme which exempted certain provisions of the Act from the operation of the savings clause. In each case Congress specifically provided for such exemption by the language "notwithstanding the provisions of section 405 of the Act." This Honorable Court, in *Shomberg v. United States*, 348 U.S. 540, 547, listed the sections exempt from section 405 as follows: Section 311 (8 U.S.C. 1422); Section 313(a) (8 U.S.C. 1421 a); 315 (a) (8 U.S.C. 1426 a); 318 (8 U.S.C. 1429); and 331(d) (8 U.S.C. 1442 d).*

---

* Section 311 provides that the right to naturalization shall not be abridged because of race, sex or marriage, and, "notwithstanding section 405 (b) this section shall apply to any person whose petition for naturalization shall hereafter be filed, or shall have been pending on the effective date of this Act." 66 Stat. 239, 8 U.S.C. 1422, 8 U.S.C. 1422.

Section 313(a) states "Notwithstanding the provisions of section 405 (b), no person shall hereafter be naturalized" who engages in specified subversive activities or who is a member of described subversive organizations. 66 Stat. 240, 8 U.S.C. 1424 (a), 8 U.S.C. 1424(a).

Section 315 (a) provides "Notwithstanding the provisions of section 405(b)", one who claims or has claimed his alienage and "is or was" thereby relieved of service in the armed forces, "shall be

The fact that Congress said explicitly and clearly what it meant in these sections with reference to avoiding the savings clause is strong evidence that it did not mean what it did not "precisely or "explicitly" say in section 241(d).

As Mr. Justice Holmes said in *United States* v. *Atchison T. & S.F.R.Co.*, 220 U.S. 37 (1910):

> "The presence of such a provision in the one part and its absence in the other is an argument against reading it as implied . . . We see no reason to suppose that Congress meant more than it said."

The presence of the phrase, "notwithstanding section 405," in sections 311, 313, 315 (a), 318 and 331 (d) and its absence from section 241 (d) should foreclose reading it by implication into the section from which it is absent. The difference in language indicates a difference in legislative intention. *Brewster* v. *Gage*, 280 U.S. 327, 336 (1929); *Crawford* v. *Burke*, 195 U.S. 176 (1904); *Pixie* v. *Chicago Title & Trust Co.*, 182 U.S. 438, 448 (1900).

Shomberg v. *United States*, 348 U.S. 540 is not to the contrary as petitioner asserts. On the contrary it supports our view. Congress in section 318 specifically carved out an exception to section 405 (b) by using the notwithstanding language. Aliens found deportable were not to be naturalized under the Internal Security Act,

---

permanently ineligible to become a citizen." 66 Stat. 242, 8 U.S.C. 1426 (a), 8 U.S.C.A. 1426(a).

Section 318 provides in part: "Notwithstanding the provisions of section 405(b), and except as provided in section 327 and 328 no person shall be naturalized against whom there is outstanding a final finding of deportability pursuant to a warrant of arrest issued under the provisions of this or any other act . . . " 66 Stat. 244, 8 U.S.C. 1429, 8 U.S.C.A. 1429.

Section 331(d) provides for the ending of enemy alien status and states: "Notwithstanding the provisions of section 405(b), this subsection shall also apply to the case of any such alien whose petition for naturalization was filed prior to the effective date of this Act and which is still pending on that date." 66 Stat. 252, 8 U.S.C. 1442(d), 8 U.S.C.A. 1442(d).

8 U.S.C. 729 (c), 64 Stat. 1015 which was existing law, nor under the new law. The specific exemption from 405 (b) which expressly covered naturalization proceedings was sufficient to carry an exemption from the entire savings clause and particularly from section 405(a). This Honorable Court made it quite clear, however, that in the absence of a specific provision to the contrary, the savings clause prevailed. It said (348 U.S. at 543):

> "We agree with petitioner that absent a specific provision to the contrary, he has rights protected by §405 (a). . . . But we hold that §318 specifically excepts rights under the prior law from the protection of §405, when these rights stem from a petition for **naturalization process.**"

In a footnote to the last quoted sentence, this Court proceeded to leave open the question here presented saying:

> "This is not to say that petitioner cannot challenge the authority of the Attorney General to deport him under §244(a) of the 1952 Act. We express no opinion as to whether such a challenge, grounded on the savings clause or otherwise, might succeed if made in the deportation proceedings."

Petitioner's status is governed by two "specific provision" requirements set forth in the savings clause. One relates to the status or condition of the alien. Unless otherwise specifically provided, nothing contained in the 1952 Act shall be construed *to affect any status (or) condition existing* on the effective date of the Act.

The second provision, which reinforces the first, relates to the continued effectiveness of the prior law. As to all such statutes or conditions, *the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect.*

Thus, the savings clause demands specific language not merely to "affect" the petitioner's status, but also de-

mands a specific provision stating that the prior law is not continued in force and effect.

In view of these linked provisions, the familiar rule of statutory construction required that the general language which had been used to encompass all of the numerous classes of aliens described in section 241(a), must succumb, even were there a conflict to the specific provisions of the savings clause.

As this Honorable Court declared in *MacEvoy* v. *United States*, 322 U.S. 102 (1943):

> "However inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment . . . Specific terms prevail over the general in the same or another statute which might otherwise be controling.' *Ginsberg & Sons* v. *Popkin*, 285 U.S. 204, 208 (1931)."

In *National Labor Relations Board* v. *Jones and Laughlin*, 301 U.S. 1, 30 (1936) this Court stated the same principle:

> "(Courts) are not at liberty to deny effect to specific provisions which Congress has the contitutional power to enact, by superimposing upon them inferences from general legislative declaration of an ambiguous character, even if found in the same statute. *The cardinal principle of statutory construction is to save and not to destroy.*" (Italics supplied.)

The cases which have given detailed analysis to the problem have found the necessary specificity wanting in section 241(d). *U.S. ex rel DeLuca* v. *O'Rourke*, 213 F. 2d 759, 764 (C.A. 8, 1954) holds 241 (d) not sufficiently specific to disturb non deportable status obtained through judicial recommendation against deportation. In the light of the Congressional policy to preserve for aliens advantages acquired under prior legislation, and in the light of

the use by Congress of such express language as "notwithstanding section 405," we submit that no language short of an equally express statement should be held to overcome the savings clause.

Policy of Preservation.

"The cardinal principle of statutory construction is to save and not to destroy." *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1936). Accord, *United States* v. *Menasche*, 348 at 538 (1954).

Congress intended to preserve the thousands of prior law adjustments of status acquired through suspension of deportation, preexamination, registry, and under the Displaced Persons Act. This Court should similarly uphold the Congressional intention to preserve rather than to destroy the statutory status quo and the nondeportable status here involved.

Giving Effect to All Parts of the 1952 Statute.

It is the Court's duty "to give effect, if possible, to every clause and word of a statute," *Montclair* v. *Ramsdell*, 107 U.S. 147, 152 (1882).

We quote from *Shomberg* v. *United States*, 348 U.S. 540, 546:

> "If the grounds for deportation are the same under the prior law as under the new Act, then nothing in the new Act affects petitioner; it is clear that rights under the savings clause have not been infringed even if there is no specific exemption. Only where something in the new law introduces a change, *thereby affecting one's status under the old law*, is the savings clause called into play. Only then is a specific exception to §405 required." 348 U.S. 546 (Italics supplied.)

We again quote from Judge Stewart in *United States* v. *Kerschner*, 228 F. 2d 142, 147:

> "On the other hand, the conclusion we have reached does no violence to the provisions of section 241(d) of the Act, 8 U.S.C.A. §1251(d), making the provisions as to deportability contained in section 241 applicable even though the alien entered the United States or that the other facts which make him deportable occurred prior to the passage of the Act. It must be remembered that section 403 of the 1952 Act expressly repealed the predecessor statutes, among them specifically the 1917 and 1924 Act. The purpose and effect of section 241(d) is therefore to remove any doubt that the provisions of the Act as to deportation shall have retrospective as well as prospective application insofar as they are not superseded by the savings provisions of section 405. For example, we can assume without deciding that section 241(a) (1) 8 U.S.C.A. §1251 (a) (1), would serve to make an alien deportable who entered the United States as a stowaway subsequent to July 1, 1924."

Judge Stewart placed the following in a footnote, p. 147:

> "The Immigration Act of 1924, 8 U.S.C.A. §201 *et seq.*, effective July 1, 1924, did not contain a limitation period on deportability. Section 14 of the Immigration Act of 1924, 43 Stat. 162, 8 U.S.C.A. (1934 Ed.) §214. Therefore, an alien entering as a stowaway after that date could acquire no immunity to deportation by the passage of time. Although that section has now been repealed by the 1952 Act, such stowaway would presumably be deportable by reason of the cited sections of the 1952 Act."

We submit that through the retroactive deportation provisions of the 1952 Act, aliens deportable under prior laws whose presence here was not detected on December 24, 1952, continued to be deportable despite the repeal of those laws. On the other hand, those who acquired a nondeportable status under the prior laws had such status preserved. In this way an effect will be given to all parts of the statute.

APPENDIX F.

Excerpt from Carson Brief.

"The issue is not whether respondent acquired a vested right to remain here. This Court sustained the power of Congress to retroactively deprive an alien of his residence here in *Marcello* v. *Bonds*, 349 U.S. 302 (1954).

The issue, however, is whether Congress through its statutory enactment has preserved respondent's residence here or taken it away. As we have indicated above, the present controversy can be solved by determining whether the old law or the new applies without defining the terms 'status, condition, or right in process of acquisition.' It should be observed, moreover, that although these terms were originally inserted to resolve a conflict in derivative citizenship cases as petitioner asserts (No. 72, p. 21), when the savings clause was expanded to cover deportation cases, it was no longer so limited (see Point II(A), *supra*).

This conflict in derivative citizenship cases was between *U. S. ex rel. Aberasturi* v. *Cain*, 147 F. 2d 449 (C.A. 2, 1945), which declined to preserve under the 1940 savings clause 'a mere condition unattended by any affirmative action by the alien or by anyone else,' and *Bertoldi* v. *McGrath*, 178 F. 2d 977 (C.A.D.C. 1949), which reached a contrary result. The present savings clause is, as petitioner admits, 'an obvious attempt to overcome the *Aberasturi* case.' (Brief, No. 435, p. 22, footnote 11). Accordingly, this Court observed in *United States* v. *Menasche*, 348 U.S. at 535:

> 'It should be noted, further, that the conflict between *Aberasturi* and *Bertoldi* involved a situation where the alien had failed to take any affirmative action to assert his claim to citizenship. Even the more restrictive *Aberasturi* opinion recognized that affirmative action by the alien might alter the result there reached. 147 F. 2d at 542. If Congress

was willing to preserve a mere condition unattended by any affirmative action, we think its savings clause also reaches instances, such as this, where affirmative action is present.'

Petitioner's argument that some affirmative action was required to preserve respondent's status, therefore, can not be sustained."

APPENDIX G

Federal Rule of Civil Procedure

Rule 60. Relief from Judgment or Order.

(b) **Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.** On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an in

dependent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28 U.S.C. § 1655, or to set aside a judgment for fraud upon the court. Writs of *coram nobis, coram vobis, audita querela*, and bills of review and the bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules are by an independent action. As amended Dec. 27, 1946, and Dec. 29, 1948, effective Oct. 20, 1949.